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SUPREME COURT OF THE

UNITED STATES

October Term 1967

No. 1293

FRED CHERRY, et al.,

Petitioners,

–against–

THE POSTMASTER-GENERAL OF THE UNITED STATES, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Petitioners,

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THE POSTMASTER-GENERAL OF THE UNITED STATES, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Fred Cherry, Petitioner, *pro se,* and Julius C. Tortorice, Petitioner, *pro se,* respectfully request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit, entered in the above-entitled case on February 6, 1968.

OPINIONS BELOW

The opinion of the United States District Court for the District of Puerto Rico is reported at 272 F. Supp. 982. It is reproduced in Appendix C of this petition, pages 53a-60a *infra.*

The Court of Appeals for the First Circuit did not render an opinion. Its judgment is reproduced in Appendix D of this petition, page 66a *Infra.*

JURISDICTION

The judgment of the Court of Appeals for the First Circuit was filed and entered on February 6, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The Post-Office Department seized numerous post cards mailed to numerous persons and organizations by one of the petitioners (the sender). After a considerable period of time had elapsed from the time the seizures began, the Post-Office Department held an administrative proceeding at which the sender's post cards were found to be non-mailable and ordered to be destroyed. The sender thereupon brought suit to enjoin destruction of the post cards and one to whom post cards were mailed intervened (the receiver). The sender and receiver also demanded the calling of a three-judge court to pass on the constitutionality of the statutes which provide for the seizure, detention, and destruction of said post cards. The District Court dismissed the complaint for failure to raise a substantial federal question and the Court of Appeals affirmed.

The questions presented are:

1. Are the statements on the sender's post cards, in general, protected from suppression by the First Amendment to the United States Constitution?

2. Does 18 U.S.C. 1718, on its face or as applied, violate either the sender's or the receiver's rights to freedom of speech and press as guaranteed by the First Amendment to the United States Constitution?

3. Assuming that newspapers or magazines may be sent through the mails without wrappers, with defamation and scur-

rility exposed on their exterior surface; does 18 U.S.C. 1718, on its face or as applied, violate either the sender's or the receiver's rights under the due process clause of the Fifth Amendment to the United States Constitution?

4. Does 39 U.S.C. 4001, on its face or as applied, violate either the sender's or the receiver's rights to freedom of speech and press as guaranteed by the First Amendment to the United States Constitution?

5. Does 39 U.S.C. 4001, on its face or as applied, violate the sender's rights under the due process clause of the Fifth Amendment to the United States Constitution?

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The statutes, etc., whose construction are herein involved are:

The First Amendment to the United States Constitution.
The Fifth Amendment to the United States Constitution.
18 U.S.C. 1718.
39 U.S.C. 4001.
39 C.F.R. 124.4(a), 39 C.F.R. 124.5(e), 39 C.F.R. 124.9(b), 39 C.F.R. 952.19 and 39 C.F.R. 953.

These statutes, etc., are set forth in Appendix "A", *infra*.

STATEMENT OF THE CASE

A

The petitioners are; Fred Cherry, *pro se*, and Julius C. Tortorice, *pro se*. The respondents are; the Postmaster-General of the United States; and the Postmasters of Brooklyn, New York; New York, New York; and San Juan, Puerto Rico. Numerous post cards mailed by Fred Cherry (the sender) were seized by the Post-Office Department and after a considerable period of time had elapsed, (see Affidavit, Appendix C, pages 37a-38a, *infra*) the Post-Office Department held an administrative proceeding at which the post cards which had been seized previously were found to be non-mailable, and ordered to be destroyed. (see Appendix B, pages 11a-21a, *infra*, and Appendix C, pages 30a-36a, *infra*) The sender thereupon brought suit to enjoin the

destruction of the post cards and Julius C. Tortorice, Petitioner, to whom one of the post cards was mailed intervened (the receiver). (see Motion to Intervene, Appendix C, page 52a, *infra*) A sample of one of the post cards is exactly reproduced as an exhibit to the complaint. It is herein reproduced in Appendix C, pages 35a-36a, *infra*. The petitioners also demanded the calling of a three-judge court to enjoin the enforcement of 18 U.S.C. 1718 and 39 U.S.C. 4001 for repugnance to the United States Constitution. (Paragraphs 1, 3, and 4 of section of complaint praying for relief, Appendix C, pages 28a-29a, *infra*). The petitioners also demanded that the three-judge court render a declaratory judgment that 18 U.S.C. 1718 and 39 U.S.C. 4001 are unconstitutional. (paragraphs 5 and 6 of the section of the complaint praying for relief, Appendix C, page 29a, *infra*). The District Court eventually dismissed the complaint for failure to raise a substantial federal question. (Memorandum of Decision, Appendix C, pages 53a-60a, *infra*) and the Circuit Court of Appeals affirmed without opinion. (Judgment of the Circuit Court, Appendix D, page 66a, *infra*).

B

Federal jurisdiction in the District Court was alleged in the complaint, *inter alia*, upon 28 U.S.C. 1339, which provides that: "The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to the postal service." (see paragraph 1 of complaint, Appendix C, pages 26a-27a, *infra*) Jurisdiction was further alleged in paragraph 1 of the complaint, *inter alia*, upon 28 U.S.C. 1356 and 5 U.S.C. 1009.

C

The questions herein presented for review were raised and passed upon in the District Court and the Court of Appeals as follows:

1. Question No. 1 was raised in the complaint by alleging therein that: "The information contained in these post cards is true; is of general political, religious, and sociological significance; and is fair comment upon the conduct of persons in respect of public affairs." (paragraph 6 of complaint, Appendix C, page

27a, *infra*). Also the sender specifically argued that his writings were protected from suppression by the First Amendment in that portion of his brief, filed in the District Court on 1/17/67, which was reproduced on page 18 of the Appendix to petitioners' Appellate brief. This portion is also reproduced herein at Appendix C, pages 39a-40a, *infra*. The District Court passed upon this point in two ways. First, the District Court held that the sender admits in his brief that the post cards are, among other things, libelous and threatening. (Opinion, Appendix C, pages 56a-57a, *infra*). (The petitioners will argue, *infra*, that the sender made no such admission.) The District Court also held that it does not seem that the speech sought to be protected is of general political, religious, and sociological significance, nor does it seem to be a fair comment upon the conduct of persons in respect of public affairs. (Opinion, Appendix C, page 58a, *infra*). The same point was then raised before the Court of Appeals, in paragraph 2 of the statement of points. (Appendix D, page 64a, *infra*). As mentioned previously, the Court of Appeals did not render an opinion.

Question No. 2 was raised in paragraph 9(a) of the complaint. (Appendix C, page 28a, *infra*) The District Court specifically ruled upon this point by holding that: "Plaintiff is not foreclosed from expressing himself. Simply, the manner in which it is done is regulated by law in a very minor form. This does not amount to an abridgement of the First Amendment rights." (Appendix C, page 58a, *infra*). This same point was then raised before the Court of Appeals in paragraphs 3a and 3b of the statement of points. (Appendix D, page 64a, *infra*). As mentioned previously, the Court of Appeals did not render an opinion.

Question No. 3 was raised in paragraph 9(b) of the complaint. (Appendix C, page 28a, *infra*). This point was not even mentioned in the District Court's Opinion. The same point was then raised in paragraphs 4a and 4b of the statement of points before the Court of Appeals. (Appendix D, page 65a *infra*). As mentioned previously, the Court of Appeals did not render an opinion.

Question No. 4 was raised in the *amended* complaint, filed

on 12/23/66. (Appendix C, pages 38a-39a, *infra*). The District Court specifically ruled upon this point, in its Opinion, by holding that: "The Post Office Department held an administrative hearing and it was after this hearing that the ruling came as to the destruction of plaintiff's post cards. There has been no showing by the plaintiff as to why this Court should hold that his [*sic*] procedure is contrary to the due process of law or any other constitutional or legal right. Plaintiff's rights are fully protected and provided for in this procedure and there is no denial of due process merely because the courts of law do not intervene in the matter in the first instance. *Public Clearing House* v. *Coyne*, 1904, 194 U.S. 497." (Appendix C, pages 58a-59a, *infra*). (The petitioners will argue, *infra*, that this neglects the allegation that the post cards were seized and detained a considerable period of time *before* the administrative hearing was commenced.) The above-quoted excerpt from the District Court's Opinion also passes upon question No. 5. Question No. 5 was raised in paragraph 10 of the complaint (Appendix C, page 28a, *infra*). Question No. 4 was raised before the Court of Appeals at paragraphs 5a and 5b of the statement of points. Question No. 5 was raised before the Court of Appeals at paragraphs 6a and 6b of the statement of points. (Appendix D, page 65a, *infra*). As mentioned previously, the Court of Appeals did not render an opinion.

REASONS FOR GRANTING THE WRIT

INTRODUCTION

The main question in this case is whether the Federal Government may censor truthful criticism of public figures when said criticism appears on the exterior surface of mail, merely because said criticism reflects injuriously on the character or conduct of the person criticized. This question has never been before this Court, although it has been decided numerous times by lower courts. Most of the lower court decisions have upheld the Federal Government's power to so censor. Collections (by

no means complete) of these cases may be found at 11 A.L.R. 3rd 1276 and 112 A.L.R. 1145. The annotator, at 11 A.L.R. 3rd 1278, holds that: "Contentions that the statutes in question should be found invalid as infringing freedom of speech as guaranteed under the First Amendment . . . have not found favor with the courts." This widely-held notion that the use of the mails is *not* protected by the First Amendment ought to be corrected by this Court.

QUESTION No. 1

THE STATEMENTS ON THE SENDER'S CARDS ARE, IN GENERAL, PROTECTED FROM SUPPRESSION BY THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION

The Court of Appeals, in affirming the judgment of the District Court, has sanctioned a judgment which was arrived at in a manner which so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. As part of its opinion, the District Court held that: "Plaintiff does not . . . deny that said post cards are in fact libelous, defamatory, sucrilous and threatening. It would seem from his brief that, on the contrary, he candidly admits that this is the nature of his postcards." (See Appendix B, pages 56a-57a, *infra*). This finding was vigorously denied before the Court of Appeals on pages 13-15 of Petitioners' brief before that Court as follows: (Please note that R.A. 17-19, for example, refers to pages 17-19 of the record appendix to Petitioners' *Appellate* brief.)

> The District Court further erred in holding that plaintiff-appellant did not "deny that said postcards are in fact libelous, defamatory, scurrilous and threatening. It would seem from his brief that, on the contrary, he candidly admits that this is the nature of his postcards." (R.A. 32-33). As previously mentioned, plaintiff-appellant alleges, in his complaint, that the statements on the post cards are true, are of general political, religious and sociological significance and are fair comment on persons in respect of

public affairs. (R.A. 5). If this be so, then the statements cannot, as a matter of law, be libelous. Furthermore, the plaintiff-appellant *did* argue that the statements on the post cards are not libelous. Plaintiff-appellant distinguished the case of *McCrossen* v. *United States*, 339 F.2d 810, from the present case by noting that McCrossen's statements were libelous and threatening while plaintiff-appellant's statements are not (R.A. 17-19). Furthermore, in holding that the plaintiff-appellant candidly admits, in his brief, that the post cards are libelous, the District Court has made a finding without a scrap of evidence to support it. For this reason the appellants have made available to this Court, as part of the record, all briefs submitted by both sides. If the appellees care to point out the place where either appellant made said admissions, or, indeed where appellees even charged that the post cards were libelous, they are at liberty to do so. The appellees have correctly stated that the plaintiff-appellant sent the post cards in question and intended that the statements thereon would reflect injuriously upon the character or conduct of another person (R.A. 10-11). The appellants have *never* admitted anything even remotely resembling the admissions which the District Court charges them with having made. Similarly, the District Court erred in holding that the post cards are threatening. Why should plaintiff-appellant have taken the trouble to formally deny that the post cards are threatening when there had not been the slightest suggestion made to that effect prior to the decision of the District Court? Furthermore, as mentioned previously, in arguing that the post cards in question differed from the writings in the case of *McCrossen* v. *United States,* 339 F.2d 810, plaintiff *did*, in effect, deny that the post cards in the present case are threatening. (R.A. 17-19). But rather than consider the question of accusations or denials in reference to the alleged threatening character of the post cards, it is far more important to consider the actual question of whether or not the post cards *are* threatening. This is easily decided since it is obvious, *on their face,*

that the post cards in question are not threatening. Finally, the District Court held that: "As the United States Attorney pointedly suggests, the matter printed on plaintiff's post cards is, in fact otherwise mailable by law. It could have been printed on a piece of paper, enclosed in an envelope and sent through the mails. It still can" (R.A. 34). If this be true, the post cards cannot, as a *matter of law*, be threatening. If they were, then they would violate 18 U.S.C. 875-876.

The portion of the brief before the District Court, referred to above, is reproduced herein in Appendix C, pages 39a-41a, *infra*. In addition, all of the briefs before the lower courts have been made a part of the record before *this* Court and therefore the Respondents can *still* answer this argument by pointing out, *if they can*, (1) Where, in any brief or other paper, the Petitioners admit that the post cards are libelous or threatening; (2) Where, in any brief or other paper before the District Court, the Respondents have even *accused* the post cards in question of being either libelous or threatening. The Respondents, in their Appellate brief, were unable to answer these questions. All they could say was: "18 U.S.C. 875 and 876, cited by appellants (Brief, p. 15), merely punish the use of interstate commerce or the mails for the purposes of extortion." (See footnote at page 15 of Respondents' Appellate brief.) The fact is that the District Court has done more than merely make a finding without a scrap of evidence to support it. Actually, what the District Court has done, and the Court of Appeals has sanctioned, was, *sua sponte*, to manufacture evidence out of thin air in order to support its decision.

The Court of Appeals has also sanctioned other departures from the accepted and usual course of judicial proceedings. It is a standard principle that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley* v. *Gibson*, 355 U.S. 41, 45-46. In the case at bar however, the District Court, in dismissing the complaint, has assumed a set of facts which are the

exact opposite of some of the facts set forth in the complaint. Thus, paragraph 6 of the complaint alleges that: "The information contained in these post cards is true; is of general political, religious, and sociological significance; and is fair comment upon the conduct of persons in respect of public affairs." (Appendix C, page 27a, *infra*). However, the Opinion of the District Court holds that: "To use plaintiff's own words, it does not seem that the speech sought to be protected in these circumstances 'is of general political, religious or sociological significance'; nor does it appear, in these same circumstances, to be 'a fair comment upon the conduct of persons in respect of public affairs' ". (Appendix C, page 58a, *infra*). And, as previously mentioned, the District Court manufactured evidence in order to describe the post cards as being libelous. If the information on the post cards "is true; is of general political, religious, and sociological significance; and is fair comment upon the conduct of persons in respect of public affairs"; then it cannot, *as a matter of law*, be libelous. So that the District Court, once more, assumed a fact as being the *exact opposite* of a fact alleged in the complaint.

In addition, the "Request for Admission of Facts" contained in Appendix C, pages 41a-48a, *infra*, indicates that the information inscribed on the post cards is true; is of general political, religious, and sociological significance; and is fair comment upon the conduct of persons in respect of public affairs. The request was never answered by the respondents because the respondents moved, and the Court held, that the respondents need not answer this request during the pendency of the respondents' motion to dismiss the entire action. (See Appendix C, page 49a, *infra*, and Docket Entry of 3/3/67, Appendix C, page 24a, *infra*.)

With the underbrush cleared away, so to speak, we can now consider one of the main questions of the case. If speech is true; and is of general political, religious, and sociological significance; and is fair comment on persons in respect of public affairs, it should, in general, be protected from suppression by the First Amendment. The fact that the speech sought to be protected includes strong criticism should not make any differ-

ence. As this Court held in *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270: "Thus we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on governmental and public figures. See *Terminiello* v. *Chicago*, 337 U.S. 1, 4." Also see *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130. In the *Butts* case, this Court held that even *erroneous* criticism could not be suppressed. It would certainly be the height of tyranny to permit erroneous criticism in one case and suppress truthful criticism in another. One of the principles involved here, namely: "*EQUAL* JUSTICE UNDER LAW" (emphasis supplied) is so important that it is carved into the facade of the Supreme Court Building itself.

QUESTION No. 2

18 U.S.C. 1718, ON ITS FACE AND AS APPLIED, VIOLATES BOTH THE SENDER'S AND THE RECEIVER'S RIGHTS TO FREEDOM OF SPEECH AND PRESS AS GUARANTEED BY THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION

The next point is whether speech which, in general, is protected from suppression by the First Amendment may be censored when it appears on post cards or envelopes. In *Speiser* v. *Randall*, 357 U.S. 513, 518, this Court held that: "It has been said that Congress may not, by withdrawal of mailing privileges, place limitations upon the freedom of speech which if directly attempted would be unconstitutional." In *Lamont* v. *Postmaster-General*, 381 U.S. 301, 305, this Court held that: "The United States may give up the Post Office when it sees fit, but while it carries it on the right to use the mails is almost as much a part of free speech as the right to use our tongues . . ." The same principle which applies to mail in general should also apply to post cards in particular. It is a well-known fact that commercial

advertisers use post cards. (the so-called "junk mail"). Therefore people who wish to disseminate political information and opinion should also be allowed to use post cards. The principle is; if commercial advertisers are permitted to use a certain medium, then governmental action ought not to abridge the right of a political advertiser to use that same medium. See, for example, *Kissinger* v. *New York City Transit Authority*, 274 F. Supp. 438. Also see *Wirta* v. *Alameda – Contra Costa Transit District*, California Supreme Court, 12/21/67, 434 P.2d 982. This argument can also be considered as another facet of the principle of "EQUAL JUSTICE UNDER LAW".

The Opinion of the District Court, as sanctioned by the Court of Appeals and which appears at 272 F. Supp. 982, conflicts with the entire spirit and philosophy of the First Amendment. It is true that freedom of speech is not absolute, but suppression of speech is the exception, and not the rule. Speech can be suppressed only for compelling reasons, such as riot prevention, etc. The only reason for the suppression in the case at bar, in the Opinion of the District Court, is that the sender has "bent into license" the freedoms of speech and press. (Appendix C, page 57a, *infra*). Obviously this is a meaningless phrase. It can be said of any unpopular opinion that its proponents have "bent into license" the freedoms of speech and press. Actually, the respondents, in their Appellate brief, admit that the purpose of the laws and regulations in question, as applied to the present case, is to protect the reputation of named individuals. (See pages 6, 10, and 14 of respondents' Appellate brief.) In other words, the respondents have claimed that the truth involving matters of general public concern should be suppressed solely in order to protect the reputation of a public figure. It should be noted that the person whose reputation the Post Office Department is so anxious to protect–the Reverend Robert W. Wood–is himself publicly attacking the reputation of Jesus Christ. This notion that the truth involving matters of general public concern should be suppressed solely in order to protect the reputation of public figures, is absolutely foreign to the American way of life, and if permitted to stand will eventually lead to the destruction of all our cherished freedoms.

QUESTION No. 3

ASSUMING THAT NEWSPAPERS OR MAGAZINES MAY BE SENT THROUGH THE MAILS, WITHOUT WRAPPERS, WITH DEFAMATION AND SCURRILITY EXPOSED ON THEIR EXTERIOR SURFACES; 18 U.S.C. 1718, ON ITS FACE AND AS APPLIED, VIOLATES BOTH THE SENDER'S AND THE RECEIVER'S RIGHTS UNDER THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The first part of this question is; *are* newspapers and magazines sent through the mail, without wrappers, with scurrility and defamation exposed on their exterior surfaces? The petitioners claim that such is the state of facts. (See paragraph 9(b) of complaint, Appendix C, page 28a, *infra*.) The District Court, in its Opinion, has not even mentioned this claim of discrimination raised in the complaint. Since the Court of Appeals has not rendered an opinion, the Court of Appeals has sanctioned this action of the District Court. As mentioned previously, a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley* v. *Gibson*, 355 U.S. 41, 45-46. As a matter of fact, the Initial Decision of the Hearing Examiner *admits* that the above-mentioned discrimination exists. In Appendix B, page 12a-13a, *infra*, the Initial Decision contains the following: "The Respondent filed an answer stating substantially as follows: '. . . (c) The withholding of such cards by the Post Office Department is unlawful and discriminatory since the Department permits and accepts for delivery newspapers and magazines containing defamation and scurrility on their front and rear pages clearly visible to Post Office employees." In commenting on this item, the Initial Decision, in Appendix B, page 16a-17a, *infra*, states: "The case of *U.S.* v. *Higgins*, 194 Fed. Rep. 539 (D.C.W.D.Ky. 1920) [*sic*, should be 1912], cited by Respondent is not germane to the issue here for the reason that the court held that the statute applied only to envelope wrappers and outside

covers of mailed newspapers and not to the papers themselves. Postal cards and post cards were not involved. This case was subsequently criticized by another court." In the *Higgins* case, *supra*, a newspaper was sent through the mail *without a wrapper*. The court found that the material exposed on the outside surface of the newspaper was scurrilous and defamatory and that: "it was calculated by its manner and style of display, and indeed was obviously intended to reflect upon the character and conduct of [another]." Nevertheless, the newspaper involved was found not to have violated the law.

Assuming that newspapers and magazines similar to the newspaper in the *Higgins* case, *supra*, are presently permitted to be sent through the mail, it would constitute a violation of the Fifth Amendment to suppress the distribution by mail of the sender's post cards. As this Court has held in *Lovell* v. *Griffin*, 303 U.S. 444, 452: "The liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets . . . The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion." As far as discrimination in general is concerned, this Court has held, in *Schneider* v. *Rusk*, 377 U.S. 163, 168: "while the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is 'so unjustifiable as to be violative of due process.' *Bolling* v. *Sharpe*, 347 U.S. 497, 499." In the Schneider case, *supra*, this Court found that 8 U.S.C. 1484 created "indeed a second-class citizenship." (377 U.S. at 169). Similarly, 18 U.S.C. 1718 creates a second-class freedom of the press, and is so unjustifiable that neither the District Court nor the Court of Appeals even *tried* to justify this discrimination. As a matter of fact, even the Respondents, in their Appellate brief, admit, in effect, that this discrimination is unjustifiable. The Respondents attempt to get around this point by arguing, on page 17 of their Appellate brief, that: "We note, first, that as the Post Office Department interprets 18 U.S.C. 1718, newspapers which contain exposed defamatory matter, like defamatory postal cards *are* nonmailable. There is thus absolutely no basis for appellants' statement (Appellants' Brief, p. 24). that: 'It is a common everyday practice for news-

papers to be sent through the mails, without wrappers, with scurrility and defamation exposed on their exterior surfaces.' [footnote] *(United States* v. *Higgins*, 194 Fed. 539 (D.C.W.D. Ky.), held that the exposed portion of an unwrapped newspaper, although containing defamatory matter, does not fall within 18 U.S.C. 1718 because the newspaper itself does not constitute 'the envelope or outside cover or wrapper'. The *Higgins* decision is contrary to *United States* v. *Burnell*, 75 Fed. 824 (D.C.S.D. Iowa), was criticized in *United States* v. *Anderson*, 268 Fed. 696 (D.C.D. Mont.), and is not followed by the Post Office Department.)"

The respondents may argue, as they have argued previously, that the Post Office Department has the power to censor the truth involving matters of general public concern appearing on the outside surface of newspapers and magazines, but they have *not* argued, nor can they argue, that they have actually *exercised* this power in modern times. If their claim were really valid, then the least they ought to do now is to cite a few cases in which magazines or newspapers were denied mailing privileges for the "crime" of revealing the truth involving matters of general concern, merely because said truth reflected injuriously upon the character or conduct of public figures. The petitioners have insisted, and continue to insist, that they can *prove* that magazines and newspapers are presently being sent through the mails, without wrappers, with scurrility and defamation exposed on their exterior surfaces. The fact is that in the case of *Lamont* v. *Postmaster-General*, 381 U.S. 301, the Communist Party of China won the right to send magazines containing defamatory attacks on public figures by unsealed mail. It should be noted that the Communist Party of China previously enjoyed the right to send magazines containing defamatory attacks on public figures by sealed mail. When it is also considered that the decision of *United States* v. *Higgins, supra*, 194 Fed. 539, permits these same magazines to be sent through the mails without a wrapper, we see that the Communist Party of China enjoys a greater degree of freedom of the press in our *own* nation than an American citizen. Surely, the principle of "EQUAL JUSTICE UNDER LAW" demands that an American citizen enjoy at

least the same amount of freedom of the press in his own country as is presently enjoyed by the Communist Party of China.

There is one more aspect of this claim of discrimination. As the respondents themselves point out, in a footnote at page 17 of their Appellate brief: "39 C.F.R. 124.9(b) provides that when the local postmaster is in doubt as to the mailability of matter under specified laws, including 18 U.S.C. 1718, he shall 'withhold it from dispatch or delivery, and shall send a sample or a complete statement of the facts to the Mailability Division, Office of the General Counsel, for instructions. Newspaper containing doubtful matter should be promptly reported to the Mailability Division, Office of the General Counsel, but they should not be withheld from dispatch without specific instructions.'" (See Appendix A, pages 3a-4a, *infra.*)

Now, let us consider a hypothetical example. A newspaper is sent through the mail. The local Postmaster observes defamatory material on its exterior surface. He writes to Washington, D.C. for instructions. While awaiting instructions, the newspaper gets delivered, and by the time instructions are received, it is too late to do anything except to arrest the publisher as a criminal, and give him a trial by jury. Thus the publisher of a newspaper is not subjected to prior restraint, while the sender of a post card is subjected to prior restraint. Thus not only are the petitioners subjected to prior restraint, but discriminatory prior restraint at that. This brings the argument to its next point.

QUESTION No. 4

39 U.S.C. 4001, ON ITS FACE AND AS APPLIED, VIOLATES BOTH THE SENDER'S AND THE RECEIVER'S RIGHTS TO FREEDOM OF SPEECH AND PRESS AS GUARANTEED BY THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION.

This question refers to prior restraint and administrative censorship. This Court, in *Bantam Books Inc.* v. *Sullivan*, 372 U.S. 58, 70, held that: "Any system of prior restraint of expression comes to this Court bearing a heavy presumption against

its constitutional validity." In a concurring opinion in *Manual Enterprises* v. *Day*, 370 U.S. 478, 497-499 (particularly footnote No. 4 at page 498), Justice Brennan clearly and specifically held that a claim that administrative censorship by the Post Office Department violates the constitution, is a claim for a three-judge court. In *Freedman* v. *Maryland*, 380 U.S. 51, 61-62, Justice Douglas and Black, in a footnote to a concurring opinion, held that: "The Court today holds that a system of movie censorship must contain at least three procedural safeguards if it is not to run afoul of the First Amendment. (1) the censor must have the burden of instituting judicial proceedings; (2) any restraint prior to judicial review can be imposed only briefly in order to preserve the status quo; and (3) a prompt judicial determination of obscenity must be assured." Also see *Teitel Film Corp.* v. *Cusak*, 19 L ed 2d 966, 968-969.

If this Court declines to pass upon the first three questions presented herein, it would, in effect, permit the continuation of discriminatory political censorship. However, there remains *this* question and the following question which should still be passed upon. In *Manual Enterprises* v. *Day*, 370 U.S. 478, 497, Justice Brennan, in a concurring opinion, held that: "We risk erosion of First Amendment liberties unless we train our vigilance upon the methods whereby obscenity is condemned no less than upon the standards whereby it is judged." It may also be said that we risk erosion of First Amendment liberties (whatever is left of them) unless we train our vigilance upon the methods whereby *political criticism* is condemned no less than upon the standards whereby it is judged. 18 U.S.C. 1718 permits a very mild form of political criticism to be exposed on envelopes and post cards. Cf. *McKnight* v. *United States*, 78 F.2d 931. But when political criticism exposed upon post cards and envelopes becomes slightly more robust, uninhibited, or wide-open, it may then be suppressed at an administrative proceeding. Cf. *Stevens* v. *Summerfield*, 151 F. Supp. 343; Aff'd. 257 F.2d 205. The line between mild political criticism and robust political criticism should be determined, in the first instance, by a court of law, and not by an administrative proceeding. For one thing, an administrative proceeding before the Post Office

Department does not even provide for subpoenas. (39 C.F.R. 952.19, Appendix A, page 4a, *infra*). For another thing, there is no time limit on how long post cards or letters may be detained *before* an administrative hearing is commenced. (See paragraph 4c of Affidavit, Appendix C, page 38a, *infra*.)

Consider the specific example of the post card filed with the District Court at a hearing on 12/23/66 and reproduced in Appendix C, page 50a, *infra*. This post card has not yet been found to be nonmailable. (Any statement by the *receiver* as to its mailability is not binding on the *sender*, since there is no attorney-client relationship between the sender and the receiver.) This card denounces a certain congressman. If the sender tries to mail copies of this card during a congressional election campaign, the Post-Office Department can seize the cards and delay its administrative proceeding until *after* the election. Worse yet, the Post-Office Department may seize, detain, and destroy the cards without any notice or hearing whatsoever. This can be done as provided by 39 C.F.R. 953.2, which provides that: "The rules [rules of practice in proceedings relative to mailability] shall be applicable only to cases where the matter offered for mailing shall be of substantial value or quantity. The initial determination of this question by the General Counsel may be appealed to the Judicial Officer." (See Appendix A, page 5a, *infra*).

On the other hand, even if this Court finds 18 U.S.C. 1718 to be unconstitutional, the Post-Office Department would still retain the power to censor the very same post cards by merely *accusing* them of being obscene. Cf. 39 C.F.R. 124.4(a), 124.9(b), and 953.3, Appendix A, *infra*. Therefore, regardless of whether or not 18 U.S.C. 1718 is found to be unconstitutional, 39 U.S.C. 4001 must be declared to be unconstitutional.

QUESTION No. 5

39 U.S.C. 4001, ON ITS FACE AND AS APPLIED, VIOLATES THE SENDER'S RIGHTS UNDER THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The final question to be considered is: What *disposition* is

to be made of items declared to be nonmailable at an administrative proceeding? May the Post-Office Department, *without a judicial determination*, order their forfeiture and destruction, or must they be returned to the sender? It must be noted that the Postmaster-General has the option of either returning the cards to the sender, or ordering their forfeiture and destruction. Volume 1 of Davis, *Administrative Law Treatise*, page 252, points out that, in exercising this discretionary power: "It is undeniable that [political] pressures substantially affect the ultimate conclusion." And, as for the general question of forfeitures without judicial determination, 37 *Corpus Juris Secundum* 11, states: "Regardless whether it is a common-law or judicial forfeiture or a legislative or statutory forfeiture, a judicial determination of the forfeiture by a court of competent jurisdiction is necessary to its validity."

There is another aspect of this question to be considered. The Post-Office Department has consistently refused to inform the sender of the post cards as to the *number* of his post cards seized and as to *when* the seizures took place. (See Paragraphs 4b and 4c of Affidavit, Appendix C, pages 37a-38a, *infra*.) The sender has the right to know this information. If the Post-Office Department is permitted to destroy the post cards in question, then they will have succeeded in permanently depriving the sender of this information. This Court has held that there exists a general right to information. In *Zemel* v. *Rusk*, 381 U.S. 1, 16, (footnote No. 17), this Court held that: "Indeed, it was precisely this sort of consideration which led us to hold in *Kent* v. *Dulles, supra*, 357 U.S. at 126-127, that the right to travel is protected by the Fifth Amendment. See also *Aptheker* v. *Secretary of State, supra*, 378 U.S. at 520 (Douglas, J., concurring)."

If there exists a general right to information, then surely a person is entitled to know *what the government is doing to him.* If a person cannot even determine the particulars of a governmental action directly affecting him, then the situation is similar to the situation described in Franz Kafka's novel: *The Trial.*

CONCLUSION

There are some opinions which, for various reasons, are banned completely from the usual means of entry into the marketplace of ideas. For example, the sender claims to have experienced great difficulties in attempting to disseminate his information and opinion. (See Appendix C, page 51a, *infra.*) As Thomas I. Emerson stated in his article, *Toward a General Theory of the First Amendment*, in 72 Yale Law Journal 877, 953:

> Development of the mass media of communication in this country raises the most pressing current questions as to the scope of government measures necessary or advisable for maintaining an effective system of free expression. The problem has been clear for some time. More and more control over communication is being centralized in the hands of a small group which owns and operates the mass media. As a result the communication reaching most members of the community conforms to a single pattern; other views are rarely or never heard. Instead of a system of open communication, in which all the facts and a diversity of opinion are available in the market place of ideas, our system approaches a closed one in which only a single point of view with minor variations can find an outlet.

Similarly, Jerome A. Barron, in his article, *Access to the Press—A New First Amendment Right*, 80 Harvard Law Review 1641, 1648, states: "A realistic view of the first amendment requires recognition that a right of expression is somewhat thin if it can be exercised only at the sufferance of the managers of mass communications." This, of course, is the reason that the sender uses post cards to disseminate his views. The managers of mass communications are reluctant to disseminate the material on the post cards in question, or equally outspoken material, either by paid advertisement or otherwise, for fear of "rocking the boat." This leaves the use of post cards, in this and similar circumstances, as the only *effective* means of long-distance mass communication. The sender considers that post cards differ from letters in as great a degree as radio broadcasting differs

from telephonic communication. Radio broadcasting is obviously more suited to mass communication than is the telephone. As Eberhard P. Deutsch wrote, in a slightly different context, in, *Freedom of the Press and of the Mails*, 36 Michigan Law Review 703, 732, (1938): "... the suggestion made ... that other avenues of circulation remain open to publishers, attains all the pitiful significance of the statement attributed to Marie Antoinette, who, when told that the people had no bread to eat, suggested 'Let them eat cake!' " Finally, on page 749 of this same article, Deutsch states that: "On the assumption, therefore, that liberty of publishing includes liberty of circulating, and that this liberty is infringed by an abridgement of the right to use the mails, the principle of *Near* v. *Minnesota* [283 U.S. 697] must be held to be at least equally applicable to the act of Congress allowing mail to be banned which carries defamatory matter in its envelope or wrapper." This article was cited with approval by this Court at least twice—once in *Hannegan* v. *Esquire*, 327 U.S. 146, 156, and again in *Manual Enterprises* v. *Day*, 370 U.S. 478, 500.

Respectfully submitted,

FRED CHERRY
petitioner, *pro se*

&

JULIUS C. TORTORICE
petitioner, *pro se*

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The First Amendment to the United States Constitution provides in pertinent part as follows:

"Congress shall make no law . . . abridging the freedom of speech or of the press . . ."

The Fifth Amendment to the United States Constitution provides in pertinent part as follows:

"No person shall . . . be deprived of . . . liberty, or property, without due process of law."

Title 18 U.S.C. No. 1718

All matter otherwise mailable by law, upon the envelope or outside cover or wrapper of which, or any postal card upon which is written or printed or otherwise impressed or apparent any delineation, epithet, term, or language of libelous, scurrilous, defamatory, or threatening character, or calculated by the terms or manner or style of display and obviously intended to reflect injuriously upon the character or conduct of another, is nonmailable matter, and shall not be conveyed in the mails nor delivered from any post office nor by any letter carrier, and shall be withdrawn from the mails under such regulations as the Postmaster General shall prescribe.

Whoever knowingly deposits for mailing or delivery, anything declared by this section to be nonmailable matter, or knowingly takes the same from the mails for the purpose of circulating or disposing of or aiding in the circulation or disposition of the same, shall be fined not more than $1,000 or imprisoned not more than one year, or both. June 25, 1948, c. 645, 62 Sta . 782.

Title 39 U.S.C. No. 4001

(a) Matter, the deposit of which in the mails is punishable under sections 1302, 1341, 1342, 1461, 1463, 1714, 1715, 1716, 1717, or 1718 of title 18, is nonmailable.

(b) Except as provided in section 4002 of this title, nonmailable matter which reaches the office of delivery, or which may be seized or detained for violation of law, shall be disposed of as the Postmaster General directs. Pub. L. 86-682, Sept. 2, 1960, 74 Stat. 654.

Sections 124.4 (a), 124.5 (e), 124.9 (b), 952.19 and 953 of Title 39 of the Code of Federal Regulations are set forth below, as indicated.
(Please note that Section 953 has been recently recodified. It was formerly numbered as Section 203, and is so referred to in the administrative proceedings and in the proceedings before the District Court.)

Title 39—Chapter I

PART 124—NONMAILABLE MATTER

Sec.

124.1 Introduction.
124.2 Harmful matter.
124.3 Intoxicating liquors.
124.4 Obscene and indecent matter.
124.5 Lotteries, frauds, and libelous matter.
124.6 Disloyalty and threats to the President.
124.7 Copyright violations.
124.8 Certain foreign communications.
124.9 Opinions on mailability.

AUTHORITY: The provisions of this Part 124 issued under R.S. 161, as amended, sec. 1, 62 Stat. 740, 741, 761–763, 768, 769, 781, 782, 64 Stat. 451; 5 U.S.C. 22, 17 U.S.C. 101, 18 U.S.C. 871, 876, 877, 1262, 1302, 1305, 1341, 1342, 1461, 1463, 1714–1718, 39 U.S.C. 501, 4000–4007, 4057, 4353.

SOURCE: The provisions of this Part 124 appear at 26 F.R. 11524, Dec. 6, 1961, unless otherwise noted. Redesignated at 31 F.R. 15350, Dec. 8, 1966.

§ 124.4 Obscene and indecent matter.

(a) *Lewd or filthy matter.* Obscene, lewd, lascivious, or filthy publications or writings, or mail containing information concerning where, how, or from whom such may be obtained, and matter which is otherwise mailable but which has on its wrapper or envelope any indecent, lewd, lascivious, or obscene writing or printing. Any mail containing any filthy, vile, or indecent thing.

§ 124.5 Lotteries, frauds, and libelous matter.

(e) *Libelous matter.* Any matter otherwise mailable which has on its outside wrapper or envelope, or any postal card or post card carrying on it:

(1) Any libelous, scurrilous, defamatory, or threatening language, whether written or printed, or which by its manner or style of display is obviously intended to reflect injuriously on the character or conduct of another; or

(2) Any language asking for payment of a bill, which by its manner or style of display is defamatory and reflects injuriously on the character of addressee.

§ 124.9 Opinions on mailability.

(b) Postmasters and other employees at post offices shall not give opinions to the public concerning the mailability of matter under §§ 124.4, 124.5, 124.6,

124.7, 124.8 and §§ 125.5, 125.6 of this chapter. When in doubt as to the mailability of any such matter, the postmaster shall withhold it from dispatch or delivery, and shall send a sample or a complete statement of the facts to the Mailability Division, Office of the General Counsel, for instructions. Newspaper containing doubtful matter should be promptly reported to the Mailability Division, Office of the General Counsel, but they should not be withheld from dispatch without specific instructions.

§ 952.19 Subpoenas.

The Post Office Department is not authorized by law to issue subpoenas requiring the attendance or testimony of witnesses.

PART 953—RULES OF PRACTICE IN PROCEEDINGS RELATIVE TO MAILABILITY

Sec.

953.1 Authority for rules.
953.2 Limitation.
953.3 Initiation.
953.4 Complaint.
953.5 Notice of hearing; service.
953.6 Compromise and informal dispositions.
953.7 Answer.
953.8 Default.
953.9 Hearing.
953.10 Change of place of hearing.
953.11 Presiding officers.
953.12 Proposed findings of fact.

953.13 Initial decision.
953.14 Appeal.
953.15 Departmental decision.
953.16 Expedition.
953.17 Disposition.

AUTHORITY: The provisions of this Part 953 issued under 5 U.S.C. 301, 39 U.S.C. 501.

SOURCE: The provisions of this Part 953 appear at 26 F.R. 12777, Dec. 30, 1961, unless otherwise noted. Redesignated at 31 F.R. 16270, Dec. 20, 1966.

§ 953.1 Authority for rules.

These rules of practice are issued by the Judicial Officer of the Post Office Department pursuant to authority delegated by the Postmaster General.

§ 953.2 Limitation.

The rules shall be applicable only to cases where the matter offered for mailing shall be of substantial value or quantity. The initial determination of this question by the General Counsel may be appealed to the Judicial Officer.

§ 953.3 Initiation.

Upon receipt of mail matter of doubtful mailability under the provisions of 18 U.S.C. 1302, 1461, 1463, 1717 or 1718 (see also 39 U.S.C. 4001) submitted by a postmaster pursuant to § 124.9(b) of this chapter (§ 124.92 of the Postal Manual), the General Counsel shall: (a) File a complaint with the Docket Clerk of the Post Office Department or (b) instruct the postmaster to accept such matter for mailing.

§ 953.4 Complaint.

The complaint shall: (a) State statutory and/or regulatory authority for withholding the matter from the mails; (b) specify the character or content of the matter which the Complainant believes to be nonmailable; and (c) request the issuance of a notice of hearing by the Docket Clerk.

§ 953.5 Notice of hearing; service.

Upon receipt of the complaint the Docket Clerk shall issue a notice setting the time and place for the hearing. The date set for the hearing shall be within ten days of the date of the filing of the complaint. The notice, together with copies of the complaint and these rules, shall be sent promptly to the postmaster at the place of mailing to be served upon the mailer or his agent. A receipt therefor shall be obtained and forwarded immediately to the Docket Clerk. If personal service cannot be made, the notice of hearing shall be deposited in the mails for delivery in the regular course which shall constitute valid service. A report of such delivery shall be promptly forwarded to the Docket Clerk.

§ 953.6 Compromise and informal dispositions.

The mailer may request a conference with the Complainant to consider informal disposition of any question of mailability or apply to the Complainant for the withdrawal of the matter from the

mails. When such a request is received, the scheduled hearing date will be postponed for such period of time as may be necessary but in no event longer than five days unless specifically requested by the mailer. If no agreement is reached, the proceeding shall promptly be rescheduled for hearing.

§ 953.7 Answer.

The mailer may file an answer to the complaint and appear in person or by counsel at the hearing. The answer shall contain a reply to each allegation in the complaint and shall be filed in triplicate with the Docket Clerk in Room 3350, Post Office Department, Washington, D.C. 20260, at least three days prior to the date set for the hearing. Each allegation not answered shall be deemed admitted.

§ 953.8 Default.

If no answer to the complaint is filed, the mailer shall be deemed in default and the Judicial Officer shall instruct the postmaster of the disposition to be made of the matter in accordance with § 953.17. If the mailer files an answer but fails to appear at the hearing, the Hearing Examiner shall receive the evidence of the Complainant and render an initial decision pursuant to § 953.13.

§ 953.9 Hearing.

Unless otherwise ordered by the presiding officer, the hearing shall be held in Room 5241, Post Office Department, 12th and Pennsylvania Avenue NW.,

Washington, D.C. 20260, on the date set in the notice.

§ 953.10 Change of place of hearing.

Not later than the date fixed for the filing of the answer, a party may file a request that a hearing be held to receive evidence in his behalf at a place other than that designated for hearing in the notice. He shall support his request with a statement outlining: (a) The evidence to be offered in such place; (b) the names and addresses of the witnesses who will testify; (c) the reasons why such evidence cannot be produced at Washington, D.C. The presiding officer shall give consideration to the convenience and necessity of the parties and the relevancy of the evidence to be offered.

§ 953.11 Presiding officers.

The presiding officer at any hearing shall be a Hearing Examiner qualified pursuant to the Administrative Procedure Act (5 U.S.C. 1010) or the Judicial Officer (74 Stat. 554, Public Law 86–676). The Chief Hearing Examiner shall assign cases to Hearing Examiners upon rotation so far as practicable. The Judicial Officer may, for good cause shown, preside at the reception of evidence in proceedings where expedited hearings are requested by either party.

§ 953.12 Proposed findings of fact.

Unless otherwise ordered, proposed findings of fact and conclusions of law shall be submitted orally or in writing at the conclusion of the hearing.

§ 953.13 Initial decision.

Unless given orally at the conclusion of the hearing, the Hearing Examiner shall render an initial decision as expeditiously as practicable following the conclusion of the hearing, and the receipt of the proposed findings, if any. The initial decision shall become the departmental decision if an appeal is not perfected.

§ 953.14 Appeal.

Either party may file exceptions in a brief on appeal to the Judicial Officer within five days after receipt of the initial decision unless additional time is granted. A reply brief may be filed within five days after the receipt of the appeal brief by the opposing party.

§ 953.15 Departmental decision.

The Judicial Officer shall render a Departmental decision or refer the matter to the Postmaster General for decision. The decision shall be served upon the parties and the postmaster.

§ 953.16 Expedition.

For the purposes of further expedition the parties may, with the concurrence of the Judicial Officer, agree to waive any of these procedures. When the Judicial Officer presides at the hearing, he shall render a tentative or final decision after the conclusion of the hearing. Exceptions may be filed to a tentative decision in accordance with § 953.14.

§ 953.17 Disposition.

Matter found to be nonmailable shall be held at the post office where detained for a period of fifteen days from the date of the Departmental decision, unless extended by the Judicial Officer. During that time the mailer may make application for the withdrawal of the matter. The Judicial Officer shall order the matter returned to the mailer or otherwise disposed of in accordance with 39 U.S.C. 4001(b).

POST OFFICE DEPARTMENT, DIVISION OF HEARING EXAMINERS

P.O.D. DOCKET NO. 2/239, OCTOBER 5, 1966

In the matter of the Complaint that post cards mailed by Fred Cherry, Post Office Box 1017, Brooklyn, New York, are nonmailable under 18 U.S. Code § 1718 and 39 U.S. Code § 4001.

Appearances:

Saul J. Mindel, Esq., Office of the General Counsel, Post Office Department, Washington, D.C., for the Complainant.

Fred Cherry, pro se, Post Office Box 1017, Brooklyn, New York, Respondent.

INITIAL DECISION OF HEARING EXAMINER

This action was initiated by the General Counsel of the Post Office Department pursuant to the provisions of Title 39, Section 4001 [1] of the United States Code, alleging that the Respondent had deposited in the United States mails post cards containing defamatory matter obviously intended to reflect injuriously upon the character or conduct of another contrary to

[1] § 4001. Nonmailable matter:

(a) Matter, the deposit of which in the mails is punishable under sections 1302, 1341, 1342, 1461, 1463, 1714, 1715, 1716, 1717, or 1718 of title 18, is nonmailable.

(b) Except as provided in section 4002 of this title nonmailable matter which reaches the office of delivery, or which may be seized or detained for violation of law, shall be disposed of as the Postmaster General directs.

the provisions of Section 1718, Title 18, United States Code.[2]

Attached to the complaint as Exhibit "A" was a copy of the message side of one of such post cards, asserted to be typical of all of the aforesaid cards. The complaint alleged that such cards are nonmailable pursuant to the statutes aforesaid. Exhibit "A" is reproduced and attached hereto as "Appendix 1".

The Respondent filed an answer stating substantially as follows:

> a. Respondent admits mailing post cards identical in wording with Exhibit "A" (except the facehand printing on the bottom thereof which "varies from card to card and is absent on most cards") and generally denies all other allegations of the complaint.
>
> b. The statements appearing on said cards are true.
>
> c. The withholding of such cards by the Post Office Department is unlawful and discrimina-

[2] § 1718. Libelous matter on wrappers or envelopes:

All matter otherwise mailable by law, upon the envelope or outside cover or wrapper of which, or any postal card upon which is written or printed or otherwise impressed or apparent any delineation, epithet, term, or language of libelous, scurrilous, defamatory, or threatening character, or calculated by the terms or manner or style of display and obviously intended to reflect injuriously upon the character or conduct of another, is nonmailable matter, and shall not be conveyed in the mails nor delivered from any post office nor by any letter carrier, and shall be withdrawn from the mails under such regulations as the Postmaster General shall prescribe.

Whoever knowingly deposits for mailing or delivery, anything declared by this section to be nonmailable matter, or knowingly takes the same from the mails for the purpose of circulating or disposing of or aiding in the circulation or disposition of the same, shall be fined not more than $1,000 or imprisoned not more than one year, or both. June 25, 1948, c. 645, 62 Stat. 782.

tory since the Department permits and accepts for delivery newspapers and magazines containing defamation and scurrility on their front and rear pages clearly visible to Post Office employees.

d. The withholding of such post cards does and will violate the rights of Respondent in that such action denies freedom of expression.

A short hearing was conducted in this case.

In support of the complaint counsel for Complainant filed Exhibit "A" which is identical to Exhibit "A" attached to the complaint, (Appendix 1 hereto) and Exhibits B–1, B–2, B–3, B–4, B–5, and B–6, all of which were admitted in evidence with the consent of Respondent Cherry (Tr. 3, 4). Exhibits B–5 and B–6 are, respectively, a copy of a letter from Respondent Cherry to the Chief Postal Inspector, Post Office Department, stating that he had heard that the mailing of post cards similar to the enclosure (Exhibit B–6, an excerpt from Exhibit "A" and Appendix 1 hereto) constituted a violation of 18 U. S. Code 1718, and requesting advice as to the truth of this statement. Exhibit B–4 is a photocopy of a letter addressed to Respondent Cherry by Saul J. Mindel, Esq., Assistant General Counsel of the Post Office Department, stating that it was the opinion of that Department that the mailing of a postal card containing such a message would constitute a violation of Section 1718, Title 18, U.S. Code. Exhibits B–2 and B–3, are photocopies of a letter and enclosure from Respondent Cherry to Mr. Mindel in response to the latter's letter (Exhibit B–4, supra) further stating that the writer (Cherry) is engaged in an act of civil disobedience in sending out further information (Exhibit B–3, identical with Exhibit "A" and Appendix 1 hereto), protesting (inter alia) alleged interception of his post cards by the Post Office, and further, stating that, in

the writer's opinion, the statute is unconstitutional. Exhibit B–1 is a photocopy of a letter from Mr. Mindel in response thereto, citing a case (*McCrossen* v. *U.S.*, 339 F. 2d 810, C.A. 10, 1965) holding that the statute (18 U.S.C. 1718) is constitutional.

The Respondent Cherry admitted that he knew that violation of section 1718, Title 18, U.S. Code was a criminal offense, and that the truth of accusations made in violation of that statute is immaterial (Tr. 7). He stated that he was attacking the constitutionality of the statute (Tr. 6), that he is engaged in mailing matter of political significance in opposition to activity of the organized Homosexual Movement of America and hence protected under the First Amendment (to the U.S. Constitution) (Tr. 8), that the Postal Regulation set out in Title 39, CFR Chapter 1, part 4, section 14.9 is discriminatory on its face in that post cards of doubtful matter are to be withheld from dispatch, whereas newspapers are to be reported but not withheld (Tr. 8) and finally that the exterior surface of mailed matter is a lawful place for the publication of scurrilous and defamatory matter when it happens to be a newspaper, citing *U.S.* v. *Higgins,* 194 Fed. Rep. 541 (Tr. 9).

The Respondent then submitted a lengthy brief with some 18 exhibits purporting to prove the truth of his statements which was received in evidence over the objection of counsel for Complainant. Subsequently, both sides submitted proposed findings of fact and conclusions of law with briefs in support thereof.

At this point the undersigned Hearing Examiner desires to state that the Respondent, although not a lawyer has obtained a number of legal citations with which he has constructed a very ingenious argument. It is a temptation to discuss in detail these cases and

the points made by Respondent, but it has always been the opinion of this Examiner that such discussions and conclusions therefrom, unless directly connected with the lawful issues of the case, result in much obiter which can only confuse and obscure any subsequent cases of similar issues. Suffice it to say, therefore, that this Respondent, obviously a crusader against homosexuality, has presented a very informative and interesting discussion. Unfortunately for Respondent, however, the issues are presented by the complaint, the answer, the exhibits, the statutes, the pertinent regulations, and court decisions, which rule out the voluminous exhibits submitted to establish the truth of Respondent's assertions.

The defenses raised by Respondent, paragraphs a., b., c. and d. above, and set out in similar words in Respondent's answer will be considered in inverse order, beginning with paragraph "d," supra. That paragraph states in effect that the withholding of Respondent's postal or post cards is unconstitutional under the First Amendment. Respondent in his statements at the hearing also included the Fifth Amendment. Whether the regulation authorizing such withholding (39 CFR 14.9, Postal Manual Section 124.9) is unconstitutional is not a matter for determination by this hearing Examiner or the Post Office Department. Such a determination is one that can be made only by a court of competent jurisdiction.

> *Engineers Public Service Co.* v. *S.E.C.*, 138 F. 2d 936 (C.A.D.C. 1943).

And, as a matter of fact, the constitutionality of the mailability statute, 18 U.S.C. 1718, has been sustained as a matter within the regulatory power of Congress rather than in the light of any First Amendment limitation.

McCrossen v. *U.S.*, 339 F. 2d 810 (C.A. 10, 1965).

The same may properly be said of the Fifth Amendment to the Constitution.

And the Postal Regulation * is not discriminatory as favoring newspapers; it merely reserves to the Department rather than to the local Postmaster the determination of mailability of newspapers. When it is considered that post cards are, in effect, "one-shot" statements, which, if permitted to be delivered, would accomplish their purpose, the reason for immediate detention becomes apparent. A newspaper, on the other hand, is a continuing periodical with responsibilities to the Post Office Department and to its subscribers and advertisers, so that a reasonable and justifiable difference exists between the issues of a newspaper and a deposit of post cards. Nevertheless, it will be noted that newspapers will be withheld from the mails by the Postmaster upon receipt of instructions to do so.

The case of *U.S.* v. *Higgins,* 194 Fed. Rep. 539 (D.C.W.D. Ky. 1920), cited by Respondent is not germane to the issue here for the reason that the court held that the statute applied only to envelope wrappers and outside covers of mailed newspapers and not to the papers themselves. Postal cards and post cards

* 124.92 Postmasters and other employees at post offices shall not give opinions to the public concerning the mailability of matter under 124.4, 124.5, 124.6, 124.7, 124.8, 125.5, and 125.6. When in doubt as to the mailability of any such matter, the postmaster shall withhold it from dispatch or delivery and shall send a sample or a complete statement of the facts to the Mailability Division, Office of the General Counsel, for instructions. Newspapers containing doubtful matter should be promptly reported to the Mailability Division, Office of the General Counsel, but they should not be withheld from dispatch without specific instructions.

were not involved. This case was subsequently criticized by another court.

The quotation from *Speiser* v. *Randall*, 357 U.S. 513, 518 is similarly not germane since the constitutionality of a State law was involved there, and the statute was invalidated on the ground that it placed the burden of proof on the applicant for tax relief to show that he was not of a particular class. The court held that the burden of proof should be on the State. There is no showing here that the language used in the instant case could not be prohibited directly by law. Further, the Respondent herein cannot complain of any discrimination for the reason that his post cards or postal cards were ordered withheld from the mails only after he voluntarily submitted a sample to the Post Office Department for comment. Thus, his cards received exactly the same treatment as is provided for newspapers by the regulation. (Exhibits B–1, B–2, B–3, B–4, B–5, and B–6.)

In his paragraph numbered 2 in his answer (para. b. supra) Respondent defended on the ground that the statements on the post cards are true. It is sufficient to say that, so far as this statute is concerned, the truth is immaterial and constitutes no defense. *Warren* v. *U.S.*, 183 Fed. Rep. 718, (C.A. 8, 1910).

For the reasons aforesaid the following findings of fact are made:

1. That Respondent, Fred Cherry, did place in the United States mails postal cards or post cards in form and substance as that annexed to the complaint herein as Exhibit "A", Appendix No. 1 hereto.

2. That said cards alleged that the person named thereon, one Reverend Robert W. Wood, pastor of the Zion United Church of Christ, Newark, New Jersey: (a) Is "one of the foremost leaders of the organized homosexual movement of America"; (b) Has written a book insinuating that Jesus Christ was

a homosexual; (c) As a member of the "organized homosexual movement of America," has as his ultimate aim "to bring about a PERVERT WORLD"; (d) As a member of the said alleged "movement", he is engaged in a program "to bring about a PERVERT WORLD" which consists of the following four steps:

> (1) Legalize and encourage homosexuality between consenting adults;
>
> (2) Outlaw prostitution so that large numbers of young men will be compelled to resort to homosexuality. * * *
>
> (3) Legalize and encourage "Greek Love". * * *
>
> (4) Outlaw all normal sexual expressions between men and women. Children are to be conceived solely by artificial insemination * * *.

3. That Rev. Robert W. Wood is, or was at the time of mailing, a real person (Tr. 5).

And it is concluded as a matter of law: (a) That the terms of the aforesaid cards are obviously intended to reflect injuriously upon the character or conduct of another. (b) That the said cards are nonmailable under the provisions of 18 U.S. Code 1718, and 39 U.S. Code 4001.

Findings of fact and conclusions of law submitted by the parties are adopted to the extent herein set forth. Otherwise they are rejected as irrelevant, not supported by credible evidence or not necessary to a proper disposition of the issues.

It is recommended that the Judicial Officer issue an order in accordance with 39 CFR 203.17, Rules of Practice in Proceedings Relative to Mailability, for the disposition of the postal cards or post cards herein found to be nonmailable.

GERRARD N. BYNU,
Hearing Examiner.

Appendix 1

ARE YOU AWARE That the Reverend Robert W. Wood, pastor of the Zion United Church of Christ, Newark, New Jersey, and one of the foremost leaders of the organized homosexual movement of America, has written a book in which *he* insinuates that Jesus Christ was a homosexual?

(See "Christ and the Homosexual", (Vantage Press, 1960). In this book the Reverend Wood also cites figures which suggest that the percentage of homosexuals in the clergy is *eight times* the percentage of homosexuals in the population-at-large. Wood also writes that: "at least five of our foremost Church personalities today are homosexuals." I say that this accounts for the large numbers of clergymen who are working so strenuously and successfully for the advancement of homosexuality.)

ARE YOU AWARE That other prominent leaders of the organized homosexual movement of America have publicly advocated sodomy between adults and children?

(See "One" Magazine, Nov. '63. Also see "International Journal of Greek Love", Vol. 1, No. 1, last page. "One" Magazine is the official publication of the largest organization in America dedicated to the advancement of homosexuality. The publisher of the International Journal of Greek Love hails "Greek Love" as: "A BOLD AND DARING STORY OF HOMOSEXUALITY BETWEEN MEN AND YOUNG BOYS!". (See "Magazine of Modern Sex", Volume 1, Number 8, page 60.)

ARE YOU AWARE That the ultimate aim of the organized homosexual movement of America is to bring about a PERVERT WORLD? Fred Cherry, Box 1017, Brooklyn 2, N.Y.

(The program of the organized homosexual movement of America to bring about a PERVERT WORLD consists of the following four steps:

(1) Legalize and encourage homosexuality between consenting adults.

(2) Outlaw prostitution so that large numbers of young men will be compelled to resort to homosexuality. (See "Live and Let Live, the Moral of the Wolfenden Report", by Dr. Eustace Chesser, pages 70–71. (London, Heinemann, 1958). Also see "Prostitution and Morality", by Benjamin & Masters, pages 432–433 (Julian Press, 1964).

(3) Legalize and encourage "Greek Love". (See "One" Magazine and "International Journal of Greek Love", op. cit. Also see "The Homosexual Revolution", by R. E. L. Masters, pages 83–84. (Belmont #95–102.)

(4) Outlaw all normal sexual expression between men and women. Children are to be conceived solely by artificial insemination. (See "One" Magazine, March '61, in which the homosexuals reveal their plans just as clearly as Hitler revealed *his* plans in "Mein Kampf". A portion of this material was reprinted in "The Homosexual Revolution", op. cit. Also see "The Velvet Underground", by Michael Leigh, pages 48–50. (Macfadden Books #60–142))

ARE YOU AWARE That the mailing of these postcards may be deemed an act of civil disobedience, since they violate 18 USC 1718 (U.S. Penal Code)? This law forbids the mailing of defamatory postcards *even though the facts alleged are true.* Several months ago, I sent out postcards containing a portion of the information above. As a result of mailing those postcards, the Reverend Wood, through his attorney Arnold Becker of Spring Valley, New York, de-

manded that I recant and apologize and threatened, if I did not do so, to "bring the full weight of the law" against me. Why has he not done so? IS HE AFRAID OF THE TRUTH BECOMING MORE WIDELY KNOWN?

I am the person who called you Friday afternoon inquiring about the possibility of inserting a portion of the above information as a paid ad in your publication. If I am not afraid to send this message in the form of a postcard, you can be sure it is safe for you to print in your publication.

FRED CHERRY.

Please Note: The final Administrative Decision and Order were originally appended to the District Court Complaint, as an exhibit, at the same time said Complaint was filed with the U.S. District Court. Said Decision and Order are reproduced as part of said Complaint, as an exhibit, in Appendix C, pages 30a-36a, infra.

Civil Action No. 575-66

FRED CHERRY and JULIUS TORTORICE

PLAINTIFF

v.

THE POSTMASTER-GENERAL OF THE UNITED STATES,
THE POSTMASTER OF SAN JUAN, PUERTO RICO;
THE POSTMASTER OF BROOKLYN, NEW YORK; and
THE POSTMASTER OF NEW YORK, NEW YORK

DEFENDANTS

DOCKET ENTRIES

1966

Nov.	8	Complaint filed.
	8	Summons and 6 copies issued to U.S. Marshal with 6 copies of complaint.
	8	Motion of plff. for temporary restraining order and preliminary injunction pursuant to Rule #65, filed. 11-9-66—The above motion is set for hearing on Nov. 18, 1966 at 9:30 A.M. (Judge Cancio)
	8	Affidavit of plff. in support of motion for temporary restraining order and preliminary injunction, filed.
	8	Plff.'s memo. in support of motion for temporary restraining order and preliminary injunction, filed.
	8	Notice of hearing on motion for temporary restraining order and preliminary injunction to be brought before the Court on Nov. 18, 1966, filed. 1 s/copy issued to plaintiff.
	17	Summons ret'd. and filed exec. on Nov. 10, 1966.
	18	Court grants oral motion of atty. for defts. for postponement of hearing set for today for 30 days. Hearing is re-set for Dec. 23, 1966 and defendants' promise of not destroying plff's postal cards to prevail.

1966

Dec. 20 Motion of defts. to dismiss complaint and in opposition to motion for temporary restraining order, preliminary injunction, plff's. affidavit, plff's. motion for permanent injunction, and declaratory judgment, and plff's. request for a three-judge court, filed.

20 Memorandum of law of defts. in support of defendants' motion to dismiss, etc., filed.

23 Hearing had. Plff. requests permission to file amended complaint. Permission is granted and it is so ordered. Argument of parties on mot. of plff. for temporary restraining order, etc., heard. Matter taken under advisement. Plff. is granted 25 days to file memo. and deft. 15 days thereafter to reply.

23 Amended complaint, filed.

23 Two printed cards entitled "Are You Aware" filed by plff.

1967

Jan. 17 Plaintiff's memo. filed.

24 Motion of defts. for 30 day ext. of time to file their counter-memo. of law, filed. 1/26/66—Granted. (Judge Cancio)

Feb. 15 Plaintiff's request for admission of facts, filed.

24 Defendants' objections to plaintiff's request for admission of facts, filed.

Mar. 3 Hearing had on deft's objection to plff.'s request for admission of facts. Court rules that defts. need not answer admission of facts until the mot. to dismiss is decided. U.S. Atty. is given 5 more days to file their reply brief to plff.'s memo.

6 Defendant's reply brief, filed.

May 5 Motion of plff. to join an additional plff. pursuant to Rule #21 of the F.R.C.P., filed.

1967

5 Motion of Julius C. Tortorice to intervene as plff. pursuant to Rule #24(b)(2) of the F.R.C.P., filed.

12 Case called for hearing. Court states that motion of plff. to join and additional plff. and mot. of Julius C. Tortorice to intervene as plff. were informally discussed at chambers and that the Motion of Tortorice is granted and the motion of plff. is denied as moot. Law Clerk directed to prepare form of order.

16 Order granting motion of Julius C. Tortorice to intervene as plaintiff and denying plaintiff's motion to join Mr. Tortorice as a party plaintiff as being moot, filed. (Judge Cancio) 1 s/copy issued to U.S. Attorney, Julius C. Tortorice and Fred Cherry.

June 1 Motion of defendants to dismiss, filed.

1 Memo. of defts. in support of motion to dismiss, filed.

9 Case called for hearing on the motion of defts. to dismiss the complaint adopted by intervenor Julius C. Tortorice upon order of May 16, 1967. Statement of atty. for defts. heard. Matter is taken under submission.

14 Motion of co-plff. Julius C. Tortorice for 60 days extension of time to file memo. in opposition to defts.' motion to dismiss, filed. 6-19-67—Twenty days granted for filing of memorandum. (Judge Cancio) 1 s/copy issued to Fred Cherry, Julius C. Tortorice and U.S. Attorney.

27 Motion of defts. in opposition to motion of plff. Julius C. Tortorice, filed.

July 5 Motion of plff. in opposition to motion in opposition to motion of plaintiff J. C. Tortorice, filed.

10 Memorandum in opposition to defendants' motion to dismiss filed.

14 Plaintiff states that his motion in opposition to motion in opposition to motion of plaintiff Julius C. Tortorice is now unnecessary. Court hears statements and states matter is still under advisement.

14 Notice of plff. Fred Cherry of change of address, filed.

Aug. 7 Judge's memorandum of decision dated August 4, 1967 dismissing the complaint and continuing the stay as to the destruction of the postcards herein until appeal, if taken, is terminated or this judgment becomes final and unappealable, filed and entered. (Judge Cancio) 1 s/copy issued to Fred Cherry and to U.S. Atty.

Sept. 27 Notice of plff. and intervenor of appeal to the U. S. Court of Appeals for the First Circuit from final judgment of dismissal entered in August 1967, filed. 1 s/copy issued to U.S. Attorney.

27 Appeal bond in the sum of $250.00 deposited in cash.

Oct. 3 Motion of plaintiff-appellant to include memoranda as part of record on appeal, filed with Exhibit A attached.

25 Record on appeal mailed to the U. S. Court of Appeals for the First Circuit, together with additional certificate including memoranda.

COMPLAINT

Plaintiff, pro se, complaining of the defendants, The Postmaster-General of the United States, et al., alleges:

1. This court has jurisdiction under article III, Section 2 of the United States Constitution, under 28 U.S.C. 1331,

1339, 1356, 2201-2202, 2282 and 2284, and under 5 U.S.C. 1009. The matter in controversy exceeds the sum or value of Ten Thousand ($10,000.00) Dollars exclusive of interest and costs.

2. Pursuant to 28 U.S.C. 1391 (e); (1), (2), and (4), this action may be brought in the District of Puerto Rico on the following grounds:

(a) A defendant, the Postmaster of San Juan, Puerto Rico, resides in the District of Puerto Rico.

(b) The causes of this action are multiple, and some of them arose in the District of Puerto Rico.

(c) The plaintiff resides in Puerto Rico.

3. One of the purposes of this action is to enjoin the enforcement, operation and execution of acts of Congress for repugnance to the Constitution. Hence a three-judge court is required to be convened under 28 U.S.C. 2282, 2284.

4. The defendants are; the Postmaster-General of the United States; the Postmaster of San Juan, Puerto Rico; the Postmaster of Brooklyn, New York; and the Postmaster of New York, New York.

5. Plaintiff is an individual engaged in pamphleteering on matters of general political, religious, and sociological significance. In furtherance of this activity, plaintiff has been mailing post cards, a copy of which is herein annexed as Exhibit "A", page 5.

6. The information contained in these post cards is true; is of general political, religious, and sociological significance; and is fair comment upon the conduct of persons in respect of public affairs.

7. Defendants have been detaining these post cards and the Postmaster-General, a defendant, has concluded an administrative hearing pursuant to 39 CFR 203, of which the final departmental decision and order are annexed herein as Exhibit "A".

8. In the above mentioned decision, the Postmaster-

General, a defendant, has declared plaintiff's post cards to be non-mailable and has ordered the other defendants to hold the said post cards until November 29, 1966. After that date the other defendants have been ordered by the Postmaster-General to destroy the said post cards.

9. 18 U.S.C. 1718 is unconstitutional and void on its face and as applied because:

(a). It violates plaintiff's right to freedom of speech and press as guaranteed by the First Amendment to the United States Constitution.

(b) It violates the due process clause of the Fifth Amendment to the United States Constitution in that newspapers may be sent through the mails, without wrappers, with information exposed on their surface similar to the information contained in plaintiff's post cards. (*U.S.* v. *Higgins*, 194 F. 541). The withholding from delivery of plaintiff's post cards constitutes a *discriminatory* prior restraint.

10. 39 U.S.C. 4001 is unconstitutional and void on its face and as applied because it violates the due process clause of the Fifth Amendment to the United States Constitution in that it permits the Postmaster-General to destroy the plaintiff's post cards at the conclusion of an administrative hearing. This is tantamount to a forfeiture without judicial determination. Such a forfeiture violates "due process". (Corpus Juris Secundum, Volume 37, pages 11-12)

11. Plaintiff has no adequate remedy at law, he will be required to resort to a multiplicity of actions and will suffer irreparable injury unless the relief prayed for is granted.

WHEREFORE, plaintiff prays that:

1. Jurisdiction be taken by a three-judge Court pursuant to 28 U.S.C. 2282, 2284.

2. The Court, in pursuance of its jurisdiction under 28

U.S.C. 2282, issue a temporary restraining order and a preliminary injunction enjoining the defendants, their successors and subordinates, from destroying plaintiff's post cards.

3. The Court, in pursuance of its jurisdiction under 28 U.S.C. 2282, issue a permanent injunction enjoining the defendants, their successors and subordinates, from carrying out or enforcing 18 U.S.C. 1718 on the ground that it is unconstitutional.

4. The Court, in pursuance of its jurisdiction under 28 U.S.C. 2282, issue a permanent injunction enjoining the defendants, their successors and subordinates, from carrying out or enforcing 39 U.S.C. 4001 on the ground that it is unconstitutional.

5. The court render a declaratory judgment that the plaintiff is entitled to mail post cards without complying with 18 U.S.C. 1718 or the defendants' directives thereunder, and that 18 U.S.C. 1718 is unconstitutional on its face and as applied.

6. The court render a declaratory judgment that the defendants are not entitled to destroy mail pursuant to 39 U.S.C. 4001 without a judicial determination of the facts in each case, and that 39 U.S.C. 4001 is unconstitutional on its face and as applied; and

7. The Court grant such other and further relief as may be just and proper in the premises.

(s) FRED CHERRY
FRED CHERRY
Plaintiff, pro se
Post Office Address
604 Miramar Avenue
Santurce, Puerto Rico

Commonwealth of Puerto Rico
City of San Juan, ss

Fred Cherry, being duly sworn according to law, deposes and says: that he is *not* an attorney; that he is plaintiff,

pro se, in the foregoing complaint; that he prepared the foregoing complaint; that he is familiar with the matters alleged in the complaint and that the facts set forth therein are true and correct to the best of his knowledge, information and belief.

(s) FRED CHERRY
FRED CHERRY

Affidavit No. 811

Sworn and subscribed to before me by Fred Cherry, of legal age, single, retired, resident of New York temporarily resident of San Juan, Puerto Rico, personally known to me, at San Juan, Puerto Rico, this 7th day of November, 1966.

(s) STANLEY R. SEGAL
Notary Public

EXHIBIT "A"

POST OFFICE DEPARTMENT
JUDICIAL OFFICER
Washington, D.C. 20260

In the Matter of the Complaint That post cards mailed by FRED CHERRY Post Office Box 1017 Brooklyn, New York are nonmailable under 18 U.S. Code §1718 and 39 U.S. Code §4001.	)	P.O.D. Docket No. 2/239

ORDER

The post cards placed in the mails at Brooklyn, New York, New York City, New York, and San Juan, Puerto

Rico, by Fred Cherry, the Respondent in the above-named case, are to be held by the postmaster at each city until November 29, 1966. After that day the postmaster in each of the cities mentioned above is ordered to destroy the post cards which are the subject of the above-named matter.

(Signed) REVA BECK BOSONE
REVA BECK BOSONE
Judicial Officer

POST OFFICE DEPARTMENT
Washington, D.C. 20260

Oct 26 1966

In the Matter of the Complaint that post cards mailed by

FRED CHERRY
Post Office Box 1017
Brooklyn, New York

are nonmailable under 18 U.S. Code §1718 and 39 U.S. Code §4001.

P.O.D. Docket No. 2/239

APPEARANCES:

SAUL J. MINDEL, Esq.
Office of the General Counsel
Post Office Department
Washington, D. C.
for the Complainant

FRED CHERRY, *pro se*
Post Office Box 1017
Brooklyn, New York
Respondent

DEPARTMENTAL DECISION.

The above-named Respondent was charged by the General Counsel of the Post Office Department with depositing in the United States mails post cards containing defamatory matter apparently with the purpose of injuriously affecting the character or conduct of another person in violation of Title 39, Section 4001,[1] and the provisions of Section 1718,[2] Title 18, United States Code.

Attached hereto is Appendix 1, Exhibit "A", which shows the writings on the post cards about which the Post Office complains. The Respondent admitted that he sent the post cards and that he knew that what he was doing was in violation of the law, supra. Regardless of this he defended himself by alleging that the statute was unconstitutional, that the law, Title 39 CFR Chapter 1, part 4,

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[1] §4001. Nonmailable matter

(a) Matter, the deposit of which in the mails is punishable under sections 1302, 1341, 1342, 1461, 1463, 1714, 1715, 1716, 1717, or 1718 of title 18, is nonmailable.

(b) Except as provided in section 4002 of this title, nonmailable matter which reaches the office of delivery, or which may be seized or detained for violation of law, shall be disposed of as the Postmaster General directs.

[2] §1718. Libelous matter on wrappers or envelopes

All matter otherwise mailable by law, upon the envelope or outside cover or wrapper of which, or any postal card upon which is written or printed or otherwise impressed or apparent any delineation, epithet, term, or language of libelous, scurrilous, defamatory, or threatening character, or calculated by the terms or manner or style of display and obviously intended to reflect injuriously upon the character or conduct of another, is nonmailable matter, and shall not be conveyed in the mails nor delivered from any post office nor by any letter carrier, and shall be withdrawn from the mails under such regulations as the Postmaster General shall prescribe.

Whoever knowingly deposits for mailing or delivery, anything declared by this section to be nonmailable matter, or knowingly takes the same from the mails for the purpose of circulating or disposing of or aiding in the circulation or disposition of the same, shall be fined not more than $1,000 or imprisoned not more than one year, or both. June 25, 1948, c. 645, 62 Stat. 782.

section 14.9 was discriminatory and that what he said on the post cards was true.

The issues are simple in this case. Did the Respondent send the post cards which contained the writings described in the attached Appendix 1, Exhibit "A", and did he intend that what was said on the post cards that went through the United States mails would reflect injuriously upon the character or conduct of another person?

From studying the transcript, the briefs, the law, and the exhibits, I hereby adopt as the final Departmental Decision the Initial Decision for the reasons therein stated.

An order in accordance with 39 CFR 203.17 is hereby issued.

(s) REVA BECK BOSONE
REVA BECK BOSONE
Judicial Officer

ARE YOU AWARE
That the Reverend Robert W. Wood, pastor of the Zion United Church of Christ, Newark, New Jersey, and one of the foremost leaders of the organized homosexual movement of America, has written a book in which he insinuates that Jesus Christ was a homosexual?

(see "Christ and the Homosexual", (Vantage Press, 1960). In this book the Reverend Wood also cites figures which suggest that the percentage of homosexuals in the clergy is eight times the percentage of homosexuals in the population-at-large. Wood also writes that: "at least five of our foremost Church personalities today are homosexuals." I say that this accounts for the large numbers of clergymen who are working so strenuously and successfully for the advancement of homosexuality.)

ARE YOU AWARE
That other prominent leaders of the organized homosexual movement of America have publicly advocated sodomy between adults and children?

35a

(see "One" Magazine, Nov. '63. Also see "International Journal of Greek Love", Vol. 1, No. 1, last page. "One" Magazine is the official publication of the largest organization in America dedicated to the advancement of homosexuality. The publisher of the International Journal of Greek Love hails "Greek Love" as: "A BOLD AND DARING STORY OF HOMOSEXUALITY BETWEEN MEN AND YOUNG BOYS!". (see "Magazine of Modern Sex", Volume 1, Number 8, page 60))

ARE YOU AWARE
That the ultimate aim of the organized homosexual movement of America is to bring about a
PERVERT WORLD?
Fred Cherry
Box 1017
Brooklyn 2, N.Y.

(The program of the organized homosexual movement of America to bring about a PERVERT WORLD consists of the following four steps:

(1) Legalize and encourage homosexuality between consenting adults.

(2) Outlaw prostitution so that large numbers of young men will be compelled to resort to homosexuality. (see "Live and Let Live, the Moral of the Wolfenden Report", by Dr. Eustace Chesser, pages 70-71. (London, Heinemann, 1958) Also see "Prostitution and Morality", by Benjamin & Masters, pages 432-433 (Julian Press, 1964))

(3) Legalize and encourage "Greek Love". (see "One" Magazine and "International Journal of Greek Love", op. cit. Also see "The Homosexual Revolution", by R.E.L. Masters, pages 83-84. (Belmont # 95-102))

(4) Outlaw all normal sexual expression between men and women. Children are to be conceived solely by artificial insemination. (see "One" Magazine, March '61, in which the homosexuals reveal their plans just as clearly as Hitler revealed his plans in "Mein Kampf". A portion of this material was reprinted in "The Homosexual Revolution", op. cit. Also see "The Velvet Underground", by Michael Leigh, pages 48-50. (Macfadden Books # 60-142))

36a

ARE YOU AWARE that the mailing of these postcards may be deemed an act of civil disobedience, since they violate 18 USC 1718 (U.S. Penal Code)? This law forbids the mailing of defamatory postcards even though the facts alleged are true. Several months ago, I sent out postcards containing a portion of the information above. As a result of mailing those postcards, the Reverend Wood, through his attorney Arnold Becker of Spring Valley, New York, demanded that I recant and apologize and threatened, if I did not do so, to "bring the full weight of the law" against me. Why has he not done so? IS HE AFRAID OF THE TRUTH BECOMING MORE WIDELY KNOWN?

AFFIDAVIT IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Commonwealth of Puerto Rico
City of San Juan, ss.

Fred Cherry, being duly sworn, deposes and says:

1. He is the plaintiff, pro se, in the above entitled action.

2. This is an action for a permanent injunction and a declaratory judgment enjoining the Postmaster-General, et al., their successors and subordinates from carrying out or enforcing acts of Congress, namely 18 U.S.C. 1718 and 39 U.S.C. 4001 on grounds that said acts are unconstitutional on their faces and as applied.

3. The Postmaster-General, et al., threaten to destroy plaintiff's post cards, as more fully set forth in verified complaint.

4. Unless defendants are enjoined and restrained during the pendency of this action from the commission of the acts threatened by them, as set forth in verified complaint, the plaintiff will suffer great and irreparable damage in that:

a. The defendants will have succeeded in destroying plaintiff's property before the legality of such destruction can be adjudicated by this Court.

b. Plaintiff has mailed numerous post cards, some of which have been delivered and some of which have been withheld from delivery. Plaintiff is engaged in the activity of political pamphleteering. In furtherance of this activity, it is necessary for plaintiff to know *which* of the numerous addresses have received plaintiff's post cards so that plaintiff can gauge the effectiveness of his campaign by the response. The Post-Office Department has refused plaintiff's numerous requests to inspect said post cards. If said post

cards are destroyed at this time, plaintiff will be forever barred from obtaining this information.

c. Said post cards were mailed over an extended period of time. Plaintiff wishes to use the discovery process to determine the length of time elapsed between the time withholding of said post cards commenced and the time said withholding was brought to the notice of plaintiff. Plaintiff contends that if too great a length of time elapsed, this would constitute an additional violation of plaintiff's rights by defendants. Viewed in this light, the proposed destruction of plaintiff's post cards by defendants constitutes a destruction of evidence. Furthermore, the Post-Office Department refuse to even inform plaintiff of the total number of post cards withheld. Said number may also constitute a material fact of evidence in the present action and in future related actions.

(s) FRED CHERRY
FRED CHERRY

Affidavit No. 812

Sworn and subscribed to before me by Fred Cherry, of legal age, single, retired, resident of New York temporarily resident of San Juan, Puerto Rico, personally known to me, at San Juan, Puerto Rico, this 7th day of November, 1966.

(s) STANLEY R. SEGAL
Notary Public

AMENDED COMPLAINT

Plaintiff, pro se, hereby amends his original complaint by retaining his original complaint in its entirety and adding an additional paragraph.

The following paragraph is to be inserted between paragraph 10 and paragraph 11 of the original complaint and is to be numbered as paragraph 10a.

10a. 39 U.S.C. 4001 is unconstitutional and void on

its face and as applied because it violates the First Amendment to the United States Constitution in that it does not contain the following procedural safeguards:

I. The Post-Office Department must have the burden of instituting judicial proceedings.

II. Any restraint prior to judicial review can be imposed only briefly in order to preserve the status quo.

III. A prompt judicial determination must be assured.

(s) FRED CHERRY
FRED CHERRY
Plaintiff, pro se
Post-Office Address
604 Miramar Avenue
Santurce, Puerto Rico

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION AND MEMORANDUM OF LAW DATED DECEMBER 20, 1966. SAID MEMORANDUM AND MOTION OF DEFENDANTS CONSISTING OF MOTION TO DISMISS THE COMPLAINT AND IN OPPOSITION TO PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION, PLAINTIFF'S AFFIDAVIT, PLAINTIFF'S MOTION FOR PERMANENT INJUNCTION AND DECLARATORY JUDGMENT, AND PLAINTIFF'S REQUEST FOR A THREE-JUDGE COURT

* * *

...In addition, the circumstances of the McCrossen case were not the same as the circumstances of the present case. The statute in question, 18 U.S.C. 1718, forbids

envelopes or post cards with "language of *libelous*, scurrilous, defamatory, or *threatening* character, . . ." (emphasis supplied) Now, the type of speech which is protected by the First Amendment does *not* include threats, intimidation, or coercion of any kind. It does *not* include speech involved in carrying out commercial activities. It does *not* include epithets or personal abuse, obscenity, or libel, or speech incident to criminal activity, and perhaps several other narrowly drawn categories. (Corpus Juris Secundum, Volume 16, pages 1100, 1107) But speech which is true; and which is of general political, religious, or sociological significance; and which is fair comment upon the conduct of persons in respect of public affairs *is* protected by the First Amendment. McCrossen's writings did not come under the guarantees of the First Amendment because they were libelous and threatening. McCrossen's attorney, in effect, admitted the falsity of McCrossen's writings, but attempted to excuse said falsity under the doctrine of *New York Times* v. *Sullivan*, 376 U.S. 254. However, this was an erroneous application of the *Sullivan* doctrine, which permits false statements only if there exists reason for the person making the false statements to believe said statements to be true. In other words, the essential difference between the McCrossen case and the case at hand is that McCrossen's writings were outside the pale of speech protected by the First Amendment, while plaintiff's writings are within the area of speech protected by the First Amendment. In fact, plaintiff has been unable to discover a single case in which writings have been suppressed under 18 U.S.C. 1718, where the First Amendment issue has been raised, and where the writings in question actually were within the area of speech protected by the First Amendment. In all of the cases plaintiff has found, the writings in question could have been censored by other means, as well as by postal regulations. It must be noted

that the opinion of the court in the McCrossen case held that: "we think that writings on envelopes may be prohibited by Congress under its regulatory power even though they are not *strictly* libelous." (emphasis supplied). The court did *not* hold that: "we think that writings on envelopes may be prohibited by congress under its regulatory power even though they are not libelous." (see page 4 of defendants' memorandum)

• • •

REQUEST FOR ADMISSION OF FACTS

Please take notice that the plaintiff hereby requests the defendants, pursuant to Rule # 36 of the Federal Rules of Civil Procedure, to admit within ten days after service of this request, for the purposes of the above entitled action only, and subject to all pertinent objections to admissibility which may be interposed at the trial, the truth of the following facts:

1. The Reverend Robert W. Wood, formerly pastor of the First Congregational Church, Spring Valley, New York, was, during the years 1965 and 1966, pastor of the Zion United Church of Christ, Newark, New Jersey.

2. The Reverend Robert W. Wood is the author of a book titled: "Christ and the Homosexual".

3. Said book was published by the Vantage Press, New York, N. Y. on or about 1960.

4. Said book is listed in the Union Catalogue of the Library of Congress as being available in the libraries of the following institutions:

   a. The Garrett Biblical Institute, Evanston, Ind.
   b. The Church Divinity School of the Pacific, Berkeley, Cal.
   c. Emory University: Candler School of Theology
   d. San Francisco Theological Seminary, San Anselmo, Cal.

e. Cleveland Public Library
f. Columbia University Public Library
g. U. S. National Library of Medicine
h. University of Illinois, Urbana, Ill.
i. Washington University, St. Louis, Mo.
j. Oberlin College
k. University of Chicago

5. Said book is also available in a number of other institutions *not* listed in the Union Catalogue of the Library of Congress. One of these institutions is the New York Public Library, Fifth Avenue & 42nd Street, New York, N. Y.

6. Said book was also advertised and sold commercially.

7. Said book, on pages 168 and 169, contains the following paragraphs:

> The all-knowing deity, the God and Father of Jesus Christ, has in His infinite mercy provided not one but two avenues of expressing physical human love: heterosexual *and* homosexual. Through homosexuality, a great many more people can have a love experience, and this is good, it is moral, it is a positive help to both the individual and society.
>
> . . . . . .
>
> . . . . . .
>
> It is quite possible for homosexual love to become sacramental and thus moral. Seward Hiltner, in a chapter on "Sex—Sin or Salvation?" in *Sex and Religion Today,* admits homosexuality might be a way of achieving companionship and romance but denies that homosexual love may reach the sacramental level. Of course, this depends on one's definition of "sacramental". But if the word means an act blessed by God and enriched by His mysterious presence, then most certainly some homosexual relationships are capable of reaching this height no less

than heterosexual ones. The love between Jesus and John (John 13:23; 19:26; 20:2) certainly was on this high sacramental level. Who would dare say to the mighty Achilles that his love of Patroclus was not on such a level?

8. The last paragraph of item # 7 contains the insinuation that Jesus Christ was a homosexual.

9. On or about 1964, the Vantage Press, previously mentioned in item # 3, published a book titled: "From Jonathan to Gide".

10. Said book ("From Jonathan to Gide") contains the direct assertions that Jesus Christ and George Washington were homosexuals.

11. Said book ("From Jonathan to Gide") was advertised for sale by the New York Times during November, 1965.

12. Said book ("From Jonathan to Gide") attempts to "prove" that Jesus Christ was a homosexual by, *inter alia,* citing page 169 of the previously mentioned book: "Christ and the Homosexual".

13. There exist in the United States at the present time a number of organizations which function, in part, as political pressure groups dedicated to the advancement of homosexuality.

14. The Mattachine Society Incorporated of New York, 1133 Broadway, New York, N. Y. 10010, is one of the organizations of item # 13.

15. The Mattachine Society of Washington, P. O. Box 1032, Washington, D. C. 20013 is one of the organizations of item # 13.

16. One, Incorporated, 2256 Venice Boulevard, Los Angeles, Cal. 90006, is one of the organizations of item # 13. (see 241 F.2d 772)

17. The Reverend Robert W. Wood (item # 1) was, until recently, a member of the board of directors of the

Mattachine Society Incorporated of New York (item # 14).

18. The Mattachine Society Incorporated of New York (item # 14) published a magazine until recently.

19. The December '64 edition of the magazine mentioned in item # 18 contains the text of a sermon, delivered by the Reverend Robert W. Wood (item # 1).

20. The Reverend Robert W. Wood, in said sermon, proclaimed homosexuality to be: "a glorious gift of God".

21. There exists at present a publishing company, known as the Oliver Layton Press, P.O. Box 150, Cooper Station, New York, N. Y. 10003.

22. Said publishing company has published a book: "Greek Love", and publishes a periodical: "The International Journal of Greek Love", both edited by J. Z. Eglinton.

23. The book: "Greek Love" was written to encourage homosexual child-molesters to commit sodomy on young boys and also to instruct them on how to get away with it.

24. The book: "Greek Love" was offered for sale by advertisement in The New York Times on 7/3/66 and 7/10/66.

25. The last page of the "International Journal of Greek Love" (item # 22) carries an advertisement from the so-called "New York City League for Sexual Freedom".

26. The advertisement of item # 25 is directed to the readership of the "International Journal of Greek Love". Said readership consists mainly of homosexual child-molesters.

27. The advertisement of item # 25 is an expression, by the "New York City League for Sexual Freedom", of sympathy and support for homosexual child-molesters and their activities.

28. The advertisement of item # 25 carries the names of the members of the "Advisory Committee" and the "Steering Committee" of the "New York City League for Sexual Freedom". (item # 25).

29. Franklin Kameny, Ph.D., is listed in the advertisement of item # 25 as a member of said "Advisory Committee".

30. Randolfe Wicker is listed in the advertisement of item # 25 as a member of the "Steering Committee" of the "New York City League for Sexual Freedom" (item # 25).

31. Randolfe Wicker was also, at the time the advertisement of item # 25 was published, the "Director of Public Relations" of the "New York City League for Sexual Freedom" (item # 25).

32. Franklin Kameny, Ph.D., (item # 29) is the founder and a former president of the Washington Mattachine Society (item # 15). He is also a director of the Mattachine Society of New York (item # 14).

33. The Reverend Robert W. Wood (item # 1) and Franklin Kameny, Ph.D., (item # 29) were, for a time, simultaneously members of the board of directors of the Mattachine Society of New York (item # 14).

34. Randolfe Wicker (item # 30), during the time he was associated with the "New York City League for Sexual Freedom" (item # 25), was also a leader of the Mattachine Society of New York (item # 14) and an editor of its magazine (item # 18).

35. The August '65 issue of the magazine of the Mattachine Society of New York (item # 18) carried an article written by Randolfe Wicker (item # 30). Said article urged homosexuals to vote for Congressman William Fitts Ryan, who was, at that time, a primary election candidate for the office of mayor of the City of New York. Said article claimed that Congressman William Fitts Ryan had written a letter to the Mattachine Society of Washington (item # 15), expressing sympathy for the goals of the Mattachine Society of Washington, and ending on the note of: "If I can be of service, please do not hesitate to call on me."

36. During the summer of 1966, the Mattachine Society of New York (item # 14) attempted to put the Brooklyn Heights Press, a local newspaper, out of business by means of picketing and secondary boycotts. Said picketing and secondary boycotts were caused by the Mattachine Society of New York's displeasure with the editorial policy of the Brooklyn Heights Press.

37. One, Incorporated (item # 16) publishes a magazine (see 241 F.2d 772).

The November '63 issue of said magazine contains a review of John Roeburt's book: "Sex and the Law". Said review contains the following material:

> In regard to the still controversial subject of sexual relations with minors, Mr. Roeburt's thinking reflects, disappointingly, the attitudes of the unenlightened "general public". Psychiatrists are in agreement with what anyone of normal insight can observe, that the human being is a sexual creature from the cradle to the grave. Only those who believe that sexual activity in itself is "nasty" or "dirty" can consider it an area of life from which the innocent must be protected at all costs. For the unformed malleable adolescent, the tender example of a beloved older person can be a positive value for good, a truly educative experience, and not the traumatic nightmare some bogeymen would have us believe. It is a theme as recent as Colette, Gide and Peyrefitte, and as old as human time.
>
> Perhaps in a future generation, more thoroughly emancipated from the family and its ingrown habits than the present, lies the hope of an enlightened attitude. For only when the child is encouraged to participate without fear or restraint in every kind of sexual activity, can we hope for a society of truly free individuals.

38. Although the magazine published by one, Incorpo-

rated (item # 37) contains a "letter to the editor" column with approximately a dozen letters from readers in each issue, the two issues subsequent to the issue of November '63 failed to contain a single letter in opposition to the material cited in item # 37.

39. The March '61 issue of the magazine of item # 37 contained an article advocating homosexual "marriages" (i.e. "marriages" between male and male and "marriages" between female and female). The article further advocated that children were to be conceived by artificial insemination and brought up to become homosexuals. This plan, according to the article, would lead to the extinction of normal sexuality.

40. The Reverend Robert W. Wood (item # 1), in his book: "Christ and the Homosexual" (item # 2), and in his sermon of item # 19, also recommended the type of so-called "marriage" mentioned in item # 39.

41. The October '64 issue of the magazine of the Mattachine Society of New York (item # 18) carried an article by John P. Le Roy, the well-known homosexual writer. The article held that parents should *not* interfere when they discover that their children are being seduced by adult homosexuals and said children are themselves developing into homosexuals.

42. The State of Illinois adopted a new penal code in 1961. This code permits homosexuals to live together and commit homosexual acts with one another. Yet this same code defines as criminal the cohabitation of an unmarried man with an unmarried woman.

43. Various leaders of the Mattachine Society of New York (item # 14), including the Reverend Robert W. Wood (item # 1), and Franklin Kameny, Ph.D., (item # 29), have been actively campaigning to have laws similar to the Illinois code enacted in other states.

44. In 1964 a commission of the New York State Legis-

lature headed by Assemblyman Richard Bartlett proposed a revised penal code which would have permitted homosexual child-molesters to commit sodomy on 17-year-old boys. (Senate Into. 3918, Assembly Intro. 5376, In the 1964 Legislature)

45. The Reverend Robert W. Wood (item # 1), in his sermon of item # 19, urged the New York State Legislature to enact the proposal of item # 44 into law. The New York Times, in its editorial of 3/18/65, also urged the enactment into law of this proposal.

(s) FRED CHERRY
FRED CHERRY
Plaintiff, pro se
Post Office Address
604 Miramar Avenue
Santurce, Puerto Rico

Santurce, Puerto Rico,
February 14, 1967 (C.E.)

Commonwealth of Puerto Rico
City of San Juan, ss

Fred Cherry, being duly sworn according to law, deposes and says: that he is *not* an attorney; that he is the plaintiff, pro se, in the foregoing action (Civil Action # 575-66); that he prepared the foregoing request for admission of facts; that he is familiar with the matters set forth in the request for admission of facts and that said facts set forth therein are true and correct to the best of his knowledge, information and belief.

(s) FRED CHERRY
FRED CHERRY

Affidavit No. 859

Sworn and subscribed to before me by Fred Cherry, single, of legal age, property owner and a resident of San Juan, Puerto Rico, personally known to me, at San Juan, Puerto Rico, this 15th day of February, 1967.

(s) STANLEY R. SEGAL
Notary Public

OBJECTION TO PLAINTIFF'S REQUEST FOR ADMISSION OF FACTS

Defendants in the above case, through the undersigned attorneys, very respectfully object to the request for admission of facts served personally on them by Mr. Fred Cherry, plaintiff herein, on the ground that said request for admission of facts is improper in that:

1. Defendants' motion to dismiss the complaint and all other reliefs sought by plaintiff in said complaint, filed on December 20, 1966, has not been passed upon by this Honorable Court.

2. Defendants' reply brief in support of their motion to dismiss is due on March 3, 1967. Therefore, plaintiff's request for admission of facts is premature.

3. The purpose of Rule 36(a) of the Federal Rules of Civil Procedure "Admission of Facts and Genuineness of Documents" is to expedite trial. See *Van Horne* v. *Hines*, 31 F. Supp. 346 (D.C. D.C. 1940); *Hanauer, for Use of Wogahn* v. *Siegel*, 29 F. Supp. 329 (D.C. Ill., 1939); *Electric Furnace Co.* v. *Fire Association of Philadelphia*, 9 F. R. D. 741 (D.C. Ohio 1949); *Strausser* v. *Fascination Candy Co.*, 7 F. R. D. 267 (D.C. Ill., 1947).

4. Should defendants' motion to dismiss be granted, there will, of course, be no trial. Therefore, it should not be necessary for the defendants to respond to plaintiff's request during the pendency of defendants' motion. See Cf. *Klein* v. *The Lionel Corp.*, 18 F. R. D. 184.

San Juan, Puerto Rico, February 24, 1967.

(s) FRANCISCO A. GIL, JR.
(s) FRANCISCO A. GIL, JR.
United States Attorney
(s) CANDITA R. ORLANDI
CANDITA R. ORLANDI
Assistant U. S. Attorney

The Post Cards reproduced on this page and the next page were filed with the District Court at a hearing on 12/23/66. See Third *Docket Entry for that date, page 24a,* supra.

ARE YOU AWARE

That William Fitts Ryan, *your* Congressman and candidate for re-election to Congress from *your* district, has been publicly endorsed by a homosexual organization?

The Mattachine Society, a totalitarian political organization dedicated to the advancement of homosexuality *and the suppression of normal sexuality*, has hailed Mr. Ryan as: **"SOMEONE TO VOTE FOR!!"** in their official magazine for August, '65, during a previous election campaign.

The Mattachine Society claims that Mr. Ryan has written them a letter which expresses sympathy for their goals, and which ends on the note of: "if I can be of service, please do not hesitate to call on me."

Franklin Kameny, Ph. D. is one of the leaders of the Mattachine Society. This is the *same* Dr. Kameny whose name appears on an advertisement advocating "Greek Love". "Greek Love" has been ballyhooed among perverts as: **"A BOLD AND DARING STORY OF HOMOSEXUALITY BETWEEN MEN AND YOUNG BOYS!"**.

The notorious Reverend Robert W. Wood, Pastor of the Zion United Church of Christ, Newark, New Jersey, is another leader of the Mattachine Society. This is the *same* Reverend Wood who has written a book-("Christ and the Homosexual")-in which *he* insinuates that Jesus Christ was a homosexual; and who, in a sermon preached at a meeting of the Mattachine Society, has proclaimed homosexuality to be: **"a glorious gift of God"**.

Fred Cherry
Post Office Box 1017
Brooklyn 2, New York

ARE YOU AWARE
That the Reverend Robert W. Wood, pastor of the Zion United Church of Christ, Newark, New Jersey, and one of the foremost leaders of the organised homosexual movement of America, has written a book in which *he* insinuates that Jesus Christ was a homosexual?

ARE YOU AWARE
That other prominent leaders of the organized homosexual movement of America have publicly advocated sodomy between adults and children?

ARE YOU AWARE
That the ultimate aim of the organised homosexual movement of America is to bring about a

FAGGOT WORLD?

Fred Cherry
Box 10[17]
Brooklyn 2, N.Y.

AN OPEN LETTER TO THE NEW YORK TIMES (COPY)

Sirs:

Why don't you stop the horsefeathers? I asked you to print the information on the left as a paid ad, and in your letter of 12/1/65 you told me that you do not print attacks of a personal character in ads. That is a *lie*. Last January you printed an ad containing a vicious attack on Mike Quill, comparing him to Hitler. You also claim that there is a question of libel in my ad even after I have *proven* that the statements in it are accurate. Then you claim that my ad would be offensive to "good taste". Are you kidding? Where was "good taste" when you printed that ad for the book: "From Jonathan to Gide" which tries to "prove" that Jesus Christ and George Washington were homosexuals? Incidentally, the author of "From Jonathan to Gide" cites the book written by the Reverend Wood, referred to on the left, in his attempt to "prove" that Jesus Christ was a homosexual. Also, where was "good taste" when you published that ad for the book: "Greek Love" which encourages homosexual child-molesters to commit sodomy on young boys, and instructs them on how to get away with it?

The reason you won't print my information as a paid ad is that it doesn't fit your blatant, pro-homosexual editorial bias and no amount of horsefeathers can cover up this fact.

Yours contemptuously,
Fred Cherry

(reprinted from The East Village Other, New York, N.Y., 7/1/66, page 7.)

MOTION TO INTERVENE AS A PLAINTIFF PURSUANT TO RULE # 24(b)(2) OF THE FEDERAL RULES OF CIVIL PROCEDURE

Julius C. Tortorice, applicant, pro se, moves for leave to intervene as a plaintiff in order to assert the claims set forth herein:

1. Applicant hereby adopts the original complaint, as amended, of the original plaintiff, pro se, Fred Cherry.

2. Applicant has received a number of postcards mailed by the original plaintiff, including a postcard similar to Exhibit "A", page 5, of the original complaint.

3. All of said postcards referred to in paragraph # 2 are in violation of 18 U.S.C. 1718.

4. Defendants, commenting on *Lamont* v. *Postmaster-General,* 381 U.S. 301, on page 6 of their reply brief dated March 6, 1967, suggest that an addressee has the right to *receive* certain mailings, although a mailer does *not* have the right to *send* said mailings.

5. Therefore applicant wishes to assert, *in his own right as an addressee,* that the defendants are violating applicant's right to receive mail presently being sent to applicant by the original plaintiff.

6. The original plaintiff is unable to assert said rights of an addressee, since the original plaintiff cannot be both the sender and the addressee of his own mail.

WHEREFORE, applicant requests that he be permitted to intervene as a plaintiff.

(s) JULIUS C. TORTORICE
JULIUS C. TORTORICE
Applicant, pro se
Post Office Address
74 Bulwer Place
Brooklyn, New York
11207

MEMORANDUM OF DECISION

This case is now before this Court on two motions by the United States Attorney to dismiss: the first one as to plaintiff Fred Cherry and the second one as to intervenor Julius Tortorice, who was joined lately.

Plaintiff Cherry has argued his case. The intervenor, Tortorice, has appeared in person and through his papers, for he has not presented any argument. We must decide the case as to him on those documents, which include a brief. However, all oral arguments of Mr. Cherry on his own behalf will also be considered on behalf of Mr. Tortorice.

The Court has fully considered all of the pleadings, records, motions, briefs and other documents in the file. It has afforded several hearings to the plaintiff and the intervenor, where only the former has availed himself of this right. The United States Attorney has, similarly, been heard.

The issue involved in this case is essentially one relating to the First and Fifth Amendments to the United States Constitution. Plaintiff alleges that his rights to free speech and to property have been abridged by the Postmaster General of the United States in that the latter has refused to deliver, and has threatened to destroy, certain postcards mailed by him. The intervenor alleges that his right to receive through the mail the postcards originally mailed by the plaintiff in this case has been infringed.

On these grounds, plaintiff demands: (1) the calling of a three judge United States District Court to pass on the constitutionality of 18 U.S.C. 1718 and 39 U.S.C. 4001; (2) that this Court issue a temporary restraining order and a preliminary injunction against the Postmaster General of the United States to prevent him from destroying the postcards in question; and (3) several other petitions directed to the three judge District Court in case it were convened.

Section 1718 of the United States Code, Title 18, reads as follows:

> All matter otherwise mailable by law, upon the envelope or outside cover or wrapper of which, or *any postal card upon which is written or printed or otherwise impressed or apparent any delineation, epithet, term or language of libelous, scurrilous, dafamatory or threatening character,* or calculated by the terms or manner or style of display and obviously intended to reflect injuriously upon the character or conduct of another, is *nonmailable matter, and shall not be conveyed in the mails nor delivered* from any post office nor by any letter carrier, *and shall be withdrawn from the mails* under such regulations as the Postmaster General shall prescribe. (Italics ours)

There is a punitive clause which attaches to this provision. That clause, though, is not in question here, since there is no pleading as to any imminent or threatened sanction weighing upon either the plaintiff or the intervenor.

Plaintiff and intervenor are further challenging the constitutionality of 39 U.S.C. 4001, which reads as follows:

> (a) Matter, the deposit of which is punishable under sections 1302, 1341, 1342, 1461, 1463, 1714, 1715, 1716, 1717 or 1718 of Title 18, is nonmailable.
>
> (b) Except as provided in section 4002 of this Title, nonmailable matter which reaches the office of delivery, or which may be seized or detained for violation of law, shall be disposed of as the Postmaster General directs.

As to this second issue, plaintiff is also moving this Court, and the intervenor has joined him, to convene a three judge United States District Court pursuant to 28 U.S.C. 2284. Nevertheless, before this Court can convene such a court, the plaintiff or the intervenor must show that:

1. Jurisdiction lies in this Court.
2. There is a likelihood of success.
3. There is a likelihood or irreparable damage. (See *Benoit* v. *Gardner*, (1st Cir., 1965), 345 F.2d 792; 351 F.2d 846.)

Plaintiff predicates the jurisdiction of this Court on Article III, Section 2 of the United States Constitution, on 28 U.S.C. 1331, 1339, 1356, 1391, 2201, 2202 and 2284, and on 5 U.S.C. 1009.

As far as 28 U.S.C. 1331 is concerned, there has been no showing that the jurisdictional amount is reached. The jurisdictional amount is alleged, but there is no prayer or allegation which could possibly give this Court any reason to understand that the injury alleged could be anywhere near $10,000 or even $3,000.*

Hence, if jurisdiction lies in this case, it must lie elsewhere than in 28 U.S.C. 1331. It would seem then that the jurisdiction of this Court must rest on 28 U.S.C. 1339, which states:

> The district courts shall have original jurisdiction on any civil action arising under any Act of Congress relating to the postal service.

Since some of the acts alleged were carried out in Puerto Rico, and since the plaintiff allegedly resides within the Commonwealth of Puerto Rico and the defendant Postmaster General is represented by the United States through the U. S. Attorney in Puerto Rico, this Court has venue pursuant to 28 U.S.C. 1402.

Thus, we now pass on the question of whether the facts of this particular case comply with the requirements of *Benoit* v. *Gardner, ut sup.*, as to the likelihood of success and the showing of irreparable damage. As to the latter, it would appear that the seizure and destruction of the

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* See 48 U.S.C.A. 863; *Compagnie Nationale Air France* v. *Castaño*, 358 F.2d 203 (1966).

postcards in question might amount to irreparable injury, but we will not have to come to that point since the matter will be disposed of on the likelihood of the plaintiff succeeding in his challenge to the constitutionality of the statute.

Plaintiff has mailed at several post offices a number of post cards containing certain statements pertaining to the person and morality of a certain clergyman. These postcards state, among other things, that this man of the cloth:

1. Is one of the foremost leaders of the organized homosexual movement in America.
2. Has written a book insinuating that Jesus Christ was a homosexual.
3. As a member of the organized homosexual movement in America, has as his ultimate aim to bring about a pervert world.
4. As a member of that movement, he is engaged in a program to bring about a pervert world which consists of the following steps:
   (a) Legalize and encourage homosexuality between consenting adults.
   (b) Outlaw prostitution so that large numbers of young men will be forced to resort to homosexuality.
   (c) Legalize and encourage Greek love.
   (d) Outlaw all normal sexual experience between men and women.

Regarding these postcards, the Post Office Department, after an administrative hearing, declared that they were nonmailable matter under 18 U.S.C. 1718 and ordered that they be destroyed pursuant to 39 U.S.C. 4001.

Plaintiff does not contend that the Post Office Department erred in classifying the aforementioned postcards as nonmailable under the statute, nor does he deny that said postcards are in fact libelous, defamatory, scurrilous and

threatening. It would seem from his brief that, on the contrary, he candidly admits that this is the nature of his postcards. Nevertheless, he insists that these postcards are privileged on the grounds that, independently of their nature, their content is true, has a general political, religious or sociological significance and constitutes a fair comment upon the conduct of persons in respect to public affairs. As such, plaintiff insists that his postcards come under the protection of the First Amendment regarding freedom of speech and freedom of the press.

Freedom of speech and freedom of the press are secured by the First Amendment against abridgment by the United States to the detriment of the citizens of the United States. The safeguarding of these rights to the ends that men may speak freely on matters vital to them and that falsehoods may be exposed through the processes of education and discussion is essential to a free government. *Thornhill* v. *Alabama*, 1939, 310 U.S. 88. But freedom of speech and freedom of the press, as many other rights guaranteed by the Constitution, are not absolute. Where freedoms of this nature are bent into license, the State has the authority and the duty, not only to limit, but also to punish its abuse. *Near* v. *Minnesota*, 1931, 283 U.S. 697; *Kingsley Books, Inc.* v. *Brown*, 1957, 354 U.S. 436. The constitutional protection to freedom of speech and press does not turn upon the truth, popularity or social utility of the ideas and beliefs which are offered. *New York Times* v. *Sullivan*, 1964, 376 U.S. 254; *N.A.A.C.P.* v. *Button*, 1963, 371 U.S. 415. Hence, it is indifferent whether or not the statements made on these postcards are true or false. The question is whether or not they are protected forms of speech, to the extent that the Government is under the constitutional obligation to lend its facilities to help disseminate statements in the manner sought by plaintiff. It does not seem to be so.

To use plaintiff's own words, it does not seem that the speech sought to be protected in these circumstances "is of general political, religious or sociological significance"; nor does it appear, in these same circumstances, to be "a fair comment upon the conduct of persons in respect of public affairs".

As the United States Attorney pointedly suggests, the matter printed on plaintiff's postcards is, in fact, otherwise mailable by law. It could have been printed on a piece of paper, enclosed in an envelope and sent through the mails. It still can. It is merely the act of printing this matter on a postcard, with its surface exposed, that renders the cards nonmailable. Plaintiff is not foreclosed from expressing himself. Simply, the manner in which it is done is regulated by law in a very minor form. This does not amount to an abridgment of the First Amendment rights.

In sum, it appears to this Court that plaintiff's cause of action is entirely without merit and that it is frivolous and lacking any likelihood of success. It appears to us, too, that 39 U.S.C. 4001 and 18 U.S.C. 1718 are valid exercises by the Congress of the United States of its power to regulate the mails that the Government created and adminsters.

Plaintiff's postcards, according to the postal authorities, are libelous, scurrilous and dafamatory. He has not even tried to challenge this. They contain an attack, warranted or not, upon the person of a readily identifiable clergyman who is therein mentioned by name, position and location. We must consider them as of that nature. The Post Office Department held an administrative hearing and it was after this hearing that the ruling came as to the destruction of plaintiff's postcards. There has been no showing by the plaintiff as to why this Court should hold that his procedure is contrary to the due proces of law or any other

constitutional or legal right. Plaintiff's rights are fully protected and provided for in this procedure and there is no denial of due process merely because the courts of law do not intervene in the matter in the first instance. *Public Clearing House* v. *Coyne,* 1904, 194 U.S. 497.

As far as the intervenor is concerned, we believe that his right to receive materials through the mails is dependent on the plaintiff's right to send it through the mail. If plaintiff cannot legally send it, it seems obvious that no one has the right to receive it. You cannot be entitled to receive by mail that which cannot be sent by mail. If the Postmaster General has the right to refuse to deliver an item, that is the end of it; no one can claim that he can receive it, legally or otherwise.

In view of the foregoing, it is the decision of this Court that plaintiff and intervenor have failed to show that they have raised a controversy which requires the convening of a three judge District Court. They have failed to show that they are in danger of being irreparably injured. Finally, they have failed to show that they have raised a substantial federal question which cannot be ruled upon by a single judge and which requires the convening of a three judge District Court provided by 28 U.S.C.A. 2281.

In view of the foregoing, this Court, relying upon its power to singly dismiss this case, hereby does so. *Bailey* v. *Patterson,* 1962, 369 U.S. 31; *Idlewild Bon Voyage Corp.* v. *Epstein,* 1962, 370 U.S. 713; *Benoit* v. *Gardner,* (1st Cir., 1965), 345 F.2d 792; 351 F.2d 846.

Taking into consideration the probability that the plaintiff in this case will appeal from the decision of this Court, we believe it is in the best interest of justice to continue the stay as to the destruction of the postcards in question until appeal is terminated or this judgment becomes final and unappealable.

The complaint is dismissed and the stay kept in effect as stated above.

San Juan, Puerto Rico, August 4, 1967.

(Signed) HIRAM R. CANCIO
Chief United States District Judge

NOTICE OF APPEAL TO COURT OF APPEALS UNDER RULE # 73 (b)

Notice is hereby given that Fred Cherry, plaintiff, *pro se*, above named, and Julius C. Tortorice, intervenor, *pro se*, above named, hereby appeal to the United States Court of Appeals for the First Circuit from the final judgment of dismissal entered in the action on August 7, 1967.

(s) FRED CHERRY
FRED CHERRY
Plaintiff-Appellant, *pro se*
Post Office Address
604 Miramar Avenue
Santurce, Puerto Rico 00907

(s) JULIUS C. TORTORICE
JULIUS C. TORTORICE
Intervenor-Appellant, *pro se*
Post Office Address
74 Bulwer Place
Brooklyn, New York 11207

MOTION TO SETTLE ONE PART OF THE RECORD ON APPEAL PURSUANT TO RULE # 75(d) (1966 REVISION) OF THE FEDERAL RULES OF CIVIL PROCEDURE

Plaintiff-appellant shows to the Court as follows:

1. On September 27, 1967 (C.E.), plaintiff and intervenor filed their joint notice of appeal in the above-entitled action.

2. The memorandum of decision dismissing this action, filed and entered on August 7, 1967 (C.E.), contains the following:

> a. Plaintiff does not . . . . . deny that said post cards are in fact libelous, defamatory, scurrilous and threatening. It would seem from his brief that,

on the contrary, he candidly admits that this is the nature of his postcards. (pp. 5-6 of decision)

b. Plaintiff's postcards, according to the postal authorities, are libelous, scurrilous and defamatory. He has not even tried to challenge this. (pp. 7-8 of decision)

3. The plaintiff-appellant deems it necessary to demonstrate to the Court of Appeals the following:

a. The plaintiff-appellant *does* deny, in his brief, that said post cards are libelous *or* threatening.

b. Neither the plaintiff-appellant nor the intervenor-appellant, in any brief or other paper filed in this action, have ever admitted that said post cards are scurrilous, libelous, *or* threatening.

c. The defendants-appellees have never, in any brief or other paper filed in this action, even *accused* the post cards in question of being either libelous *or* threatening.

4. In order to demonstrate to the Court of Appeals that this Court had absolutely no basis in any memoranda for its statements reproduced in paragraph # 2 of this motion, it is necessary that all of the memoranda be included as part of the record on appeal. According to "Federal Practice and Procedure" by Barron and Holtzoff, Vol. 3A, p. 129: "It has been said that matters stated in the opinion of the district court will not be considered on appeal unless otherwise shown by the record. (*Bowles* v. *Dodge*, C.C.A. 9th, 1944, 141 F.2d 969.)"

5. Plaintiff-appellant has requested defendants-appellees to stipulate that the record on appeal shall contain all of the memoranda. Plaintiff-appellant has requested defendants-appellees to agree to a proposed stipulation herein annexed as Exhibit "A", but defendants-appellees have refused to do so.

WHEREFORE, plaintiff-appellant moves this Court that it

settle the difference between the parties and that the clerk be directed to include, as part of the record on appeal, each and every memorandum of law filed by all the parties to this action. This motion is not to be construed as affecting any other part of the record on appeal.

(s) FRED CHERRY
FRED CHERRY
Plaintiff-Appellant, *pro se*
Post Office Address
604 Miramar Avenue
Santurce, Puerto Rico 00907

Santurce, Puerto Rico
October 3, 1967 (C.E.)

STIPULATION AS TO THE CONTENTS OF ONE PART OF THE RECORD ON APPEAL PURSUANT TO RULE # 75(d) (1966 REVISION) OF THE FEDERAL RULES OF CIVIL PROCEDURE

1. It is hereby stipulated and agreed by the undersigned that one part of the record on appeal shall contain each and every memorandum of law filed by all parties in this action.

2. This stipulation shall not be construed as affecting any other part of the record on appeal.

3. This stipulation is made pursuant to the request of the plaintiff-appellant.

(s) FRED CHERRY
FRED CHERRY
Plaintiff-Appellant, *pro se*
Post Office Address
604 Miramar Avenue
Santurce, Puerto Rico 00907

GENERAL DOCKET

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Case No. 7011

FRED CHERRY ET AL.
v.
THE POSTMASTER-GENERAL
OF THE UNITED STATES ET AL.

1967	
Oct. 27	Record on appeal, in two volumes, filed and case docketed.
Oct. 30	Appearance of Fred Cherry, appellant, pro se, filed.
Nov. 6	Appearance of Julius C. Tortorice, appellant, pro se, filed.
Dec. 1	Brief and record appendix for appellants filed.
Dec. 29	Motion filed. Order (McEntee, J.) enlarging time for filing brief and record appendix for appellees to and including January 12, 1968.
1968	
Jan. 12	Brief and record appendix for appellees filed.
Jan. 16	Assigned for hearing, February session, 1968.
Jan. 25	Appearance of John C. Eldridge for appellees, filed.
Feb. 6	Heard before Aldrich, McEntee and Coffin, JJ.; appellant Tortorice submitting on brief. Judgment: The judgment of the District Court is affirmed. No opinion.
Feb. 20	Verified bill of costs filed.
Feb. 26	Motion filed by Fred Cherry, appellant. Order (Aldrich, Ch.J.) staying mandate to time prescribed by law.
Mar. 11	Motion filed by Fred Cherry, appellant. Order (Aldrich, Ch.J.) directing transmittal of original papers to the Clerk of the Supreme Court of the United States.
Mar. 12	Certified copy of proceedings to and including March 11, 1968. Original papers transmitted to Clerk of the Supreme Court.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Civil Appeal No.

FRED CHERRY,
PLAINTIFF-APPELLANT,
- & -
JULIUS C. TORTORICE,
INTERVENOR-APPELLANT,
- against -
THE POSTMASTER-GENERAL OF THE UNITED STATES;
THE POSTMASTER OF SAN JUAN, PUERTO RICO;
THE POSTMASTER OF BROOKLYN, NEW YORK; and
THE POSTMASTER OF NEW YORK, NEW YORK,
DEFENDANTS-APPELLEES.

DESIGNATION OF THE PARTS OF THE RECORD APPELLANTS PROPOSE TO PRINT IN THE RECORD APPENDIX TO THEIR BRIEF: AND STATEMENT OF POINTS. SAID DESIGNATION AND STATEMENT PURSUANT TO RULE # 23(2) OF THE RULES OF THIS COURT.

The appellants intend to rely on the following points:

(1) The original jurisdiction in this action can be founded on 28 U.S.C. 1331.

(2) The statements on plaintiff-appellant's post cards are, in general, protected from suppression by the First Amendment to the United States Constitution.

(3a) 18 U.S.C. 1718, on its face and as applied, violates appellants' rights to freedom of speech and press as guaranteed by the First Amendment to the United States Constitution.

(3b) The consideration of this question requires the convening of a three-judge court pursuant to 28 U.S.C. 2282-2284.

(4a) 18 U.S.C. 1718, on its face and as applied, violates appellants' rights under the due process clause of the Fifth Amendment to the United States Constitution.

(4b) The consideration of this question requires the convening of a three-judge court pursuant to 28 U.S.C. 2282-2284.

(5a) 39 U.S.C. 4001, on its face and as applied, violates appellants' rights to freedom of speech and press as guaranteed by the First Amendment to the United States Constitution.

(5b) The consideration of this question requires the convening of a three-judge court pursuant to 28 U.S.C. 2282-2284.

(6a) 39 U.S.C. 4001, on its face and as applied, violates appellants' rights under the due process clause of the Fifth Amendment to the United States Constitution.

(6b) The consideration of this question requires the convening of a three-judge court pursuant to 28 U.S.C. 2282-2284.

(s) FRED CHERRY
FRED CHERRY
Plaintiff-Appellant, *pro se*
Post Office Address
604 Miramar Avenue
Santurce, Puerto Rico 00907

(s) JULIUS C. TORTORICE
JULIUS C. TORTORICE
Intervenor-Appellant, *pro se*
Post Office Address
74 Bulwer Place
Brooklyn, New York 11207

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 7011

FRED CHERRY ET AL.,
Appellants,

v.

THE POSTMASTER-GENERAL
OF THE UNITED STATES ET AL.,
Appellees.

JUDGMENT

February 6, 1968

This cause came on to be heard on appeal from the United States District Court for the District Court of Puerto Rico and was argued by appellant Fred Cherry pro se, and by counsel for appellees and was submitted on brief by appellant Julius C. Tortorice.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows:

The judgment of the District Court is affirmed.

By the Court:

ROGER A. STINCHFIELD,
Clerk.

By: /s/ DANA H. GALLUP
Chief Deputy Clerk.

Enter:
/s/ ALDRICH, Ch. J.

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No. 1293

In the Supreme Court of the United States

OCTOBER TERM, 1967

FRED CHERRY, ET AL., PETITIONERS

v.

THE POSTMASTER GENERAL OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice, Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1293

FRED CHERRY, ET AL., PETITIONERS

v.

THE POSTMASTER GENERAL OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioner Cherry attempted to transmit through the mails a number of postal cards, including several addressed to petitioner Tortorice.[1] The postal cards state, *inter alia,* that the Reverend Robert W. Wood, pastor of the Zion United Church of Christ, Newark, New Jersey, is "one of the foremost leaders of the organized homosexual movement of America"; that Reverend Wood has written a book in which he "insinuates that Jesus Christ was a homosexual"; and that the "ultimate aim of the organized homosexual

[1] A representative sample of the postal cards is set out in the appendix to the petition, Pet. App. 35a–36a.

298-703—68

movement of America is to bring about a PERVERT WORLD". The postal cards also state that "the mailing of these postcards may be deemed an act of civil disobedience, since they violate 18 U.S.C. 1718."

Following a hearing[2] the Post Office Department determined that the postal cards were nonmailable under 18 U.S.C. 1718 and 39 U.S.C. 4001 because "the terms of the aforesaid cards are obviously intended to reflect injuriously upon the character or conduct of another," *viz.*, the Reverend Wood (Pet. App. 18a, 32a–33a). The Department's order provided that the postal cards should be held by local Postmasters until a certain date and then destroyed (Pet. App. 30a–31a).

Petitioner Cherry thereupon commenced this action in the United States District Court for the District of Puerto Rico, requesting that a three-judge district court be convened under 28 U.S.C. 2282 and 2284, and seeking a declaration that 18 U.S.C. 1718 and 39 U.S.C. 4001 are unconstitutional on their face and as applied, and an injunction enjoining the Postmaster General and the local Postmasters from enforcing those statutes against him (Pet. App. 26a–29a). Petitioner Tortorice subsequently was permitted to intervene as an additional plaintiff. The district court granted the government's motion to dismiss for failure to state a claim upon which relief can be granted, and held that in view of the insubstantiality of petitioners' constitutional claims, the convening of a

[2] The Rules of Practice in Proceedings Relative to Mailability are contained in 39 C.F.R. Part 953. See also 39 C.F.R. 124.9.

three-judge district court was unnecessary (Pet. App. 53a–60a).[3] The court of appeals unanimously affirmed without opinion (Pet. App. 66a).

1. In view of the insubstantiality of petitioners' constitutional claims,[4] the district court properly dismissed the action without convening a three-judge district court. There is no conflict of decisions,[5] and there is no occasion for further review by this Court.

Under 18 U.S.C. 1718, postal cards, envelopes, or other exposed matter which contain language "of libelous, scurrilous, defamatory, or threatening character, or calculated * * * to reflect injuriously upon the character or conduct of another * * *" are nonmailable.[6] Petitioners conceded below that the postal cards are obviously intended to injure the reputation of the Reverend Wood (Pet. 8; Pet. App. 32a, 36a). Petitioners also conceded that a "statute barring libelous or threatening statements on the exterior surface of mail would be constitutional" (Appellants' Brief, p. 34). They argued, however, that because Cherry claimed his statements were true, they were not strictly libelous and were protected by the First Amendment.

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[3] The district court's opinion is reported at 272 F. Supp. 982.

[4] *Bailey* v. *Patterson*, 369 U.S. 31, 33.

[5] The constitutionality of 18 U.S.C. 1718 has also been upheld in *McCrossen* v. *United States*, 339 F. 2d 810 (C.A. 10), and *Warren* v. *United States*, 183 Fed. 718 (C.A. 8).

[6] 39 U.S.C. 4001 provides that that nonmailable matter, as defined in 18 U.S.C. 1718 and other provisions of law, shall be disposed of as the Postmaster General directs.

Contrary to petitioners' contentions, the Post Office has not suppressed the postal cards or prevented Cherry from sending them, and it has not restricted the right of Tortorice to receive them.

Section 1718 merely provides that matter which is defamatory on its face may not be sent through the mails in an exposed fashion. Cherry's defamatory message could have been sent through the mails if it had been enclosed in an envelope, or even if the postal card had simply been folded and closed with a staple or other device.[7] The statute is, we submit, a reasonable accommodation between the interests of those who use the mails and the interests of others whose reputations may be injured.[8] And since the sole function of the mails is to transmit matter from sender to addressee—a service which was available to petitioners in this case—the courts below were plainly correct in ruling that there was no substantial issue under the First Amendment. See *Kovacs* v. *Cooper,* 336 U.S. 77, 89; *Breard* v. *Alexandria,* 341 U.S. 622, 642, 644.[9]

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[7] Because of the size of Cherry's postal card (Pet. App. 35a–36a), its postage fee was the same (5 cents) as for a first class letter.

[8] See *Rosenblatt* v. *Baer,* 383 U.S. 75, 86: "Society has a pervasive and strong interest in preventing and redressing attacks upon reputation."

[9] In *Lamont* v. *Postmaster General,* 381 U.S. 301, the Court invalidated a statute which required the Postmaster General to detain, and deliver only upon the addressee's request, unsealed foreign mailings of "communist political propaganda." However, the *Lamont* decision rested expressly on "the narrow ground" that "the addressee in order to receive his mail must request in writing that it be delivered. This amounts in our judgment to an unconstitutional abridgement of the addressee's First Amendment rights." 381 U.S. at 307. The Court in

2. Petitioners' additional contention—that senders of postal cards are subjected to unconstitutional discrimination because newspapers or magazines "may be sent through the mails, without wrappers, with defamation and scurrility exposed on their exterior surfaces" (Pet. 13)—is based upon a false premise. The Post Office Department regulations under 18 U.S.C. 1718 provide that newspapers and magazines which contain exposed defamatory matter are nonmailable. The fact that a different procedure [10] is fol-

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Lamont stressed that the affirmative obligation imposed upon the addressee

> is almost certain to have a deterrent effect, especially as respects those who have sensitive positions. Their livelihood may be dependent on a security clearance. Public officials, like schoolteachers who have no tenure, might think they would invite disaster if they read what the Federal Government says contains the seeds of treason. Apart from them, any addressee is likely to feel some inhibition in sending for literature which federal officials have condemned as "communist political propaganda." *Ibid.*

The considerations which motivated the Court in *Lamont* are completely lacking in the instant case. The narrow question here is whether Congress may provide that matter which is defamatory on its face may be sent through the mails only if it is covered, and not if it is exposed.

The instant case also does not involve any question as to the scope of a libel action against a "public official" or "public figure" under the doctrine of *New York Times Co.* v. *Sullivan*, 376 U.S. 254, and *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130. In this connection we note that petitioners' contention that Reverend Wood is a "public figure" was raised for the first time in oral argument before the court of appeals. Furthermore, this case does not present a situation where Congress has delegated to the Postmaster General the authority to censor the mails according to his own general conception of the public welfare. See *Hannegan* v. *Esquire, Inc.*, 327 U.S. 146.

[10] See 39 C.F.R. 124.9(b) and Pet. App. 16a.

lowed in determining the mailability of newspapers because they involve a continuing rather than an isolated use of the mails does not establish an unconstitutional discrimination. *Tigner* v. *Texas,* 310 U.S. 141, 147.

3. Finally, the procedures followed by the Post Office Department in the present case did not violate petitioners' First Amendment rights. The rationale of *Freedman* v. *Maryland,* 380 U.S. 51, and other cases cited by petitioners, is that First Amendment rights would be impaired if government officials could suppress the dissemination of matter alleged to be obscene without the assurance of a prompt judicial review of that determination. In the present case, however, there is no threat of suppression of constitutionally protected speech. Petitioners at all times have admitted that Cherry's postal cards fall within the prohibition of 18 U.S.C. 1718. Moreover, petitioners were given a hearing before the Post Office Department, and have had an opportunity for judicial review on the constitutional objection which they have raised.[11]

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[11] There is also no merit in petitioners' contention (Pet. 18) that the Post Office Department's order to destroy the nonmailable postal cards is invalid because there was no prior judicial determination. Petitioners had notice and a hearing before the Post Office Department and the opportunity for judicial review. See *Public Clearing House* v. *Coyne,* 194 U.S. 497, 508, 515–516; 1 Davis, *Administrative Law,* § 2.13, p. 134, § 4.05, p. 253 n. 9 (1958); *Glanzman* v. *Schaffer,* 252 F. 2d 333, 334 n.1 (C.A. 2), vacated on other grounds, 357 U.S. 347. Moreover, 39 C.F.R. 953.17 provides that a party whose matter has been found to be nonmailable may apply to the Judicial Officer for its return. Cherry has never exhausted that available administrative remedy.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

May 1968.

U.S. GOVERNMENT PRINTING OFFICE: 1968

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SUPREME COURT OF THE UNITED STATES

October Term 1967

No. 1293

FRED CHERRY, ET AL., PETITIONERS

v.

THE POSTMASTER GENERAL OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITIONERS' REPLY AND SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

FRED CHERRY
Petitioner, *pro se*
604 Miramar Ave.
Santurce, Puerto Rico
00907

&

JULIUS C. TORTORICE
Petitioner, *pro se*
74 Bulwer Place
Brooklyn, New York
11207

SUPREME COURT OF THE UNITED STATES

October Term 1967

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PETITIONERS' REPLY AND SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

This reply brief also contains intervening matters that were not available in time to have been included in the petition for certiorari and is therefore designated as a reply and supplemental brief.

I

In a footnote at page 6 of their memorandum in opposition, the respondents state that: "Moreover 39 C.F.R. 953.17 provides that a party whose matter has been found to be nonmailable may apply to the Judicial Officer for its return. Cherry has never exhausted that available administrative remedy." This is correct. However 39 C.F.R. 953.17 (reproduced at page 10a of the petition for certiorari) refers to "matter found to be nonmailable." An application under this provision might be construed as a concession that the post cards in question are indeed nonmailable so as to waive all constitutional claims to the contrary. Therefore petitioners feel that such an application might be premature at this time. However, if this petition for certiorari is denied, the sender will make application for the return of the post cards and if said application is denied the sender will petition this Court for a rehearing of its denial of certiorari.

II

Petitioners, on page 15 of their petition for certiorari, have argued as follows:

> The respondents may argue, as they have argued previously, that the Post Office Department has the power to censor the truth involving matters of general public concern appearing on the outside surface of newspapers and magazines, but they have *not* argued, nor can they argue, that they have actually *exercised* this power in modern times. If their claim were really valid, then the least they ought to do now is to cite a few cases in which magazines or newspapers were denied mailing privileges for the "crime" of revealing the truth involving matters of general concern, merely because said truth reflected injuriously upon the character or conduct of public figures.

It should be noted that, on pages 5-6 of their brief, the respondents are *still* arguing that the Post Office Department has this power and it should be further noted that they are *still* unable to cite a single case in which this power has actually been *exercised* in modern times. It can also be argued that the Queen

of England has the power to veto legislation. Similarly, however, no English monarch has attempted to exercise said power in modern times. If the Post Office Department dared to suppress a newspaper on the same grounds that they have suppressed petitioner's post cards, there would be such a hue and cry raised that the Post Office Department would never again be in a position to abridge *anyone's* First Amendment rights. But when the rights of an individual are denied—particularly an individual who has no influential organizations backing him—then no one seems to object, except (hopefully) this Court.

III

The respondents, in a footnote at page 5 of their brief, argue that: "In this connection we note that petitioners' contention that Reverend Wood is a "public figure" was raised for the first time in oral argument before the court of appeals." It is true that the petitioners did not previously allege, *in precisely those terms*, that the Reverend Wood is a public figure. It must be considered that the complaint was filed in the district court before the decision in the case of *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, was announced by this Court. However, in the proceedings before the district court, the petitioners did make allegations which are legally equivalent to the "public figure" designation, and in addition alleged facts from which it must be legally concluded that the Reverend Wood is a public figure. After all, exactly what is a "public figure"? In *Pauling* v. *Globe Democrat Publishing Company*, 362 F.2d 188, 196, the Court of Appeals for the 8th Circuit held that: "A lobbyist, a person dominant in a political party, the head of any pressure group, or any significant leader may possess a capacity for influencing public policy as great or greater than that of a comparatively minor public official. . . . It would seem, therefore, that if such a person seeks to realize upon his capacity to guide public policy and in the process is criticized, he should have no greater remedy than does his counterpart in public office." This seems to be a satisfactory definition of a "public figure." Similarly, the petitioners have alleged, in the proceedings before the district court, that the information contained on the post cards is true; is of general political, religious, and sociological significance;

and is fair comment upon the conduct of persons in respect of public affairs. (See petition for certiorari, page 27a.) Furthermore, the very facts on the post cards themselves, if taken as true, are enough to lead to the conclusion that the Reverend Wood is a public figure. In addition, the facts alleged in the "Request for Admission of Facts" which is reproduced on pages 41a-48a of the petition for certiorari, support the conclusion that the Reverend Wood is a public figure.

All of the foregoing argument concerning the "public figure" designation should not be permitted to obscure a more basic issue. The more basic issue being whether or not speech which is true; and is of general political, religious, and sociological significance; and is fair comment of persons in respect of public affairs; is, in general, protected from suppression by the First Amendment. The petitioners have certainly raised and preserved this more basic issue properly. ((See, in addition, petitioners' brief before the court of appeals, pages 8-13.) This Court has recently held that erroneous criticism of public figures is protected by the First Amendment. Cf. *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130. However, this Court also held, for a long period of time, that truthful criticism involving matters of public concern is also protected by the First Amendment. (See, for example, petitioners' brief before the court of appeals, pages 8-13.)

The petitioners, at this point, would like to mention some matters that were not available in time to be included in the petition for certiorari. This material is intended to further demonstrate that the information on the post cards in question is of general political, religious, and sociological significance. The material referred to appears in the December '67 issue of a publication called "Social Action." Said publication is one of two monthly publications issued by the United Church of Christ. The World Almanac for 1968, page 180, states that the United Church of Christ has over two million members and "is active in Christian education . . . mass communications . . . and social action." The aforementioned December '67 issue of the publication "Social Action" is entirely devoted to glorifying and exalting homosexuality. This issue contains, among other items,

an "annotated bibliography, prepared by the Rev. Robert Wood and a committee of UCC pastors." Said bibliography contains a plug for the book, "Christ and the Homosexual," by Robert W. Wood, mentioning that said book is the "Winner of two Awards-of-Merit." Said bibliography also contains plugs for two other works of the Reverend Wood, including a republication of the sermon mentioned at page 50a of the petition for certiorari. Said bibliography further contains a criticism of "Homosexuality and Citizenship in Florida," a report of the Florida Legislative Investigation Committee. (See petitioners' brief before the court of appeals, page 10.) Said criticism states that: "This piece of pornography, which actually carries the great seal of the State of Florida, is included to show to what depths a legislative investigation committee will go in a witch hunt of homosexuals." This last item is mentioned to demonstrate that the leaders of the organized homosexual movement of America also engage in attacks upon reputation.

The aforementioned December '67 issue of "Social Action" also contains a nine-page article by Mr. Richard Leitsch, President of the Mattachine Society of New York. For a description of the Mattachine Society of New York, see pages 41a-48a and 50a of the petition for certiorari. Said article of Mr. Leitsch states, *inter alia*, that: "Through the efforts of the Mattachine Society of New York, the New York City police were forbidden in April 1966 to make arrests for homosexual "solicitation" without a complaint signed by a private citizen, other than a police officer. . . . The City has been able to reassign to more constructive duties the several hundred police officers formerly used as decoys to apprehend homosexuals." This policy, of course, affects homosexual prostitutes as well as homosexual non-prostitutes. To understand exactly what Mr. Leitsch means by "more constructive duties" it is necessary to refer to page 19 of the New York Times of 9/17/66. An article on that page states that: "Arrests for prostitution in the city have reached their highest point in at least 10 years because of a police clean-up campaign in the midtown area. . . . Teams of plainclothesmen were sent to Times Square, Eighth Avenue, Central Park South and Lexington Avenue near the Fifties. Many of these

plainclothesmen were previously used to trap homosexuals. That practice ended in April on orders of Chief Inspector Sanford D. Garelik after the department decided it was an infringement on the homosexuals' civil liberties." (i.e., Homosexuals, both prostitute and non-prostitute, have civil liberties. Women prostitutes do not.) The Times article makes it clear that this crackdown involves only women when it further states: "In arresting streetwalkers, the police insist that there is no one area where the *women* [emphasis supplied] gather."

All of the foregoing material has been included in this brief to show that: (1) the organized homosexual movement of America has taken over the United Church of Christ, at least to the extent that said movement has prevailed upon that denomination to devote an entire issue of one of its two periodicals to pro-homosexual propaganda; and (2) a leader of the organized homosexual movement of America openly boasts that said movement has prevailed upon the City of New York to engage in a deliberate policy of discriminatory law enforcement favoring the growth of homosexuality. To show that this policy of discriminatory law enforcement favors the growth of homosexuality, see "Live and Let Live" by Dr. Eustace Chesser; and "Prostitution and Morality" by Benjamin & Masters. These books are mentioned on the very post card which is the subject of this action and is reproduced on pages 35a-36a of the petition for certiorari.

The purpose of the foregoing material is to show this Court that not only do the petitioners have the right to disseminate the information and opinion on the post cards in question, but that there is a positive *need* that this information and opinion be made available to the public. It has been said that freedom of speech does not include the right to cry "fire" in a crowded theater. However, if there actually *is* a fire, then one not only has the right, but also the duty, to warn the theatergoers of the danger.

IV

The respondents, in a footnote at page 5 of their brief, state that: "The instant case also does not involve any question as to the scope of a libel action against a "public official" or

"public figure" under the doctrine of *New York Times Co.* v. *Sullivan*, 376 U.S. 254, and *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130." In a sense this statement is correct. This is *not* a private suit for libel, but rather a governmental action to suppress a publication under a *criminal* libel statute in which truth is no defense. The issues in this case more closely resemble the issues in *The Trial of John Peter Zenger*, 17 Howell's St. Tr. 675 (1735). The *Zenger* case overruled a number of precedents of the notorious British Court of the Star Chamber.

Respectfully submitted

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&

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